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The Judiciary Committee of the House, in reporting in favor of the amended Torrey bankruptcy bill, make an intelligent and forcible presentation of the reasons for the enactment of a bankruptcy law. The committee point out that most of the commercial centers of the country are near State lines, and that as a result all of the large business concerns and most of the small ones do business in two or more States. The fact that the laws in the several States differ, subject these promoters of the commerce of the country to needless expense and to confusion, arising out of the fact that their rights and responsibilities are changed when they cross State lines. The differences and conflicting provisions of State laws are therefore obstructions to commerce and charges upon it. Injustice is worked by the State laws relating to preferences, which do away with the principle of equitable distribution by enabling one creditor to collect the amount due, while another having equal rights goes empty handed. The passage of an equitable bankrupt law would, by doing away with these hindrances, strengthen commercial credit and enlarge commercial intercourse.

A correspondent, whose letter will be found in another column, very properly takes us to task for the "countenance given to the idea that the federal courts can properly inquire into the question whether execution by electricity is 'cruel and unusual' punishment," referring to a comment made by us in an issue of recent date on the Kemmler case. We desire to say that the editorial to which exception is taken was inserted simply as a matter of news, and that the remark with which it concluded was inserted without any thought on the subject, except perhaps that if Judge Wallace could so far abuse a wise discretion by granting such a writ, at such a time and for such a purpose, he would, very probably, go to the length of considering the case upon its merits. Since that time, however, the writ has been transferred to the United States Supreme Court, and it is a very easy matter to determine its fate there in advance. That court will undoubtedly dismiss the writ upon the ground that the provision in the federal constitution as to "cruel and unusual" punishments only applies to congress and federal offenses, and can in no way be held a limitation upon State power. It has repeatedly been decided by that court that the provisions of this article of the constitution apply to national and not to State legislation. Pervear v. Commonwealth, 5 Wall. 475; Spies v. Illinois, 123 U. S. 131. Chief Justice Waite in the case last cited says: "That the first ten articles of amendment were not intended to limit the powers of the State governments in respect to their own people, but to operate on the national government alone, was decided more than half a century ago, and that decision has been steadily adhered to since."

Judge Wallace never should have issued the writ. He could, in his discretion, have refused it. Its sole purpose was evidently delay and the possible escape of the prisoner from all punishment, by the complications liable to arise therefrom. If only so far successful it adds an additional feature of delay and doubt to every State trial.

As a result of the popular outcry against this defeat, or rather delay of justice, the New York legislature passed a bill abolishing capital punishment, almost without debate. By some it is charged that the bill was put through by bribery, and that the money to pay for the votes comes from a moneyed corporation that is interested in preventing the electrical execution law from going into effect. But we have reason to believe with the *Albany Law Journal*, that "the result undoubtedly came about from a disgust felt at the outrageous course pursued by counsel in Kemmler's case, in which there never was a shadow of doubt nor a decent pretense for debate, but in which, as nearly everybody believes, some powerful citizens or corporations have undertaken to defeat the laws of this State, lest their business should be hurt." Be that as it may, the abolition of capital punishment, we believe, to be a good thing in itself, and in that view, the procedure adopted in the Kemmler case may prove to have been of some service.

Mr. Sigmund Zeisler, of the Chicago bar, has, in *The Forum* for May, prepared an elaborate and interesting review of the system requiring unanimous vote of juries. He shows that the progress in the development of the jury system has been slower than in most other lines of development, and that unanimous verdicts are now required in few civilized countries, except our own. He collects a great mass of information, and cites cases to show the uselessness of requiring a unanimous vote, and argues that the majority vote should be substituted for it. Those who cling tenaciously to the argument in favor of the time-worn practice of unanimity in juries will find in this article much food for thought.

NOTES OF RECENT DECISIONS.

BANKS AND BANKING—PAYMENT OF FORGED CHECKS.—The Court of Appeals of Kentucky, in Deposit Bank v. Fayette National Bank, 13 S. W. Rep. 339, rendered an interesting decision on the subject of payment of forged checks. It was there held that where forged checks on a bank purporting to be drawn in the name of one of its principal depositors, and running through a period of five months before the forgery is discovered, are accepted and paid by the drawee bank to other banks which accepted and paid them in good faith after inquiry of the drawee as to the depositor's account, the drawee bank must stand the loss. Pryor, J., says:

"Which of the banks should lose the money? The bank at Georgetown, where the depositor, Burgess, whose name had been forged, deposited his money; or the banks at Lexington, where the money was paid to Wolfe under the belief that the checks were genuine, and Burgess in fact the drawer? It is evident that the bank at Georgetown honored the checks drawn upon it by Burgess, for the reason that its officers believed the name of the drawer was genuine; and, if the liability of the Lexington banks to refund this money is to be determined by the well known rule of law applicable to the payment of money through a mistake of fact, the judgment in this case is erroneous. It is insisted, however, that it is a rule of commercial law long since recognized, and now firmly established, applicable at least between parties equally innocent of fraud, that the bank or its officers must know the signature of its depositor; and if such a doctrine is made to apply in this case, the appellant is the loser, and the judgment dismissing its petition was proper. The rule laid down by Lord Mansfield is that, if the banker or drawee makes a payment or gives credit upon the strength of a forged signature, the loss must be his, as between himself and the holder. "He has not known what he is bound to know." Price v. Neal, 3 Burrows, 1355. This doctrine of commercial law has been followed and recognized by nearly all the courts in the country, and as said by Mr. Justice Story in the case of Bank of U. S. v. Bank of Georgia, 10 Wheat. 333, delivered in 1825, has never been departed from, and, in the earlier cases on the subject, able jurists, in alluding to this rule, regarded it as essential as a rule of justice, and right between business men. Mr. Morse, in his work on Banking, has collated the authorities, and presented what he terms the modern doctrine on this subject; but after a careful examination of the authorities referred to, it will be found that the decided weight of authority is with Lord Mansfield, and the rule laid down in Price v. Neal is criticised only as being too sweeping in its character. Nor is it just to say that the rule adopted requiring the bank to know the signature of its depositor is without an exception; for it is undoubtedly true that the neglect or knowledge of intervening parties who come into the possession of the check, and receive the money on it from the bank where it is payable, will in some instances be of such a character as to enable the bank to recover back the money. This doctrine is recognized by Mr. Daniel in his work on Negotiable Instruments; and, while doubting the justice of the rule recognized by nearly all the authorities, under which the bank is required to know the signature of its depositor, he proceeds to say that when one knows that it is a forgery, or takes it "under circumstances of suspicion, without proper precaution, or whose conduct has been such as to mislead the bank," the money may be recovered back. Volume 2, p. 669. The case of National Bank v. Bangs, reported in 106 Mass. 441, and relied on by counsel for the appellant in this case, was where a stranger giving his name as "William D. Riskford" drew his check, payable to the order of E. D. & G. W. Bangs, on the National Bank of North America. Bangs indorsed the check, and the bank paid the money, and, when discovering the forgery, notified Banks, the payee and indorser, and sued to recover the money back; and a judgment was obtained. This, we think, was proper, as it would be an exceedingly harsh rule to permit one who negotiates with the payor, and obtains his check payable to the use of the party obtaining the money, who then indorses it to a bank, to hold on to the money when the payee has himself contracted with the payor, and given credit to the payor by his indorsement, that led the bank to believe the paper was genuine. The case of Ellis v. Trust Co., reported in 4 Ohio St. 628, sustains this view of the question. The case relied on is unlike the case before us. The banks at Lexington took the checks in the usual course of business, with the indorsement of the payee, and then indorsed the paper for collection, forwarding it to appellant's bank, where the money was credited to the Lexington banks, and charged to the account of the one supposed to be the *bona fide* drawer of the paper. In the case relied on, of National Bank v. Bangs, it is said: "If the suit were between the bank or drawee and a party who took the check in the usual course of business, finding it in circulation, or even by first indorsement from the payee, the loss would fall upon the bank; because, having greater means and opportunity to become familiar with the handwriting of their correspondents or depositors, the law presumes that drawees will know their signatures and be able to detect forgeries. * * * But this responsibility, based upon presumption alone, is decisive only when the party receiving the money has in no way contributed to the success of

the fraud, or to the mistake of fact under which the payment was made." There is a manifest distinction between the case of one who is both the payee and indorser of the check, and who negotiates directly with the payor in the loan or advance of the money for which the check is given, and a bank taking a check by indorsement from the payee in the usual course of business, with no ground of suspicion, and that receives the money on the check from a bank where the funds of the drawer are deposited. One of the two innocent parties must suffer, and there must be some rule of commercial law to guide banks and business men in this character of business transactions. Therefore, when a bank has the means of knowing the signature of the drawer of a check upon it by reason of the drawer being its depositor or customer, the relation between the bank and its depositor is such that the bank must be presumed to know that the signature is genuine when making payment.

The case of Ellis v. Trust Co., reported in 4 Ohio St. 628, recognizes this rule, and says the foundation for it is: "The party is supposed to know his own handwriting in the one case, or that of his customer or correspondent in the other, much better than the holder can; and the law, therefore, allows the holder to cast upon him the entire responsibility of determining as to the genuineness of the instrument, and, if he fails to discover the forgery, imputes to him negligence, and, as between him and the innocent holder, compels him to suffer the loss." After conceding the general doctrine on the subject, the court proceeds to say that the holder may by his negligent conduct deprive himself of the benefit of this rule, and that case was decided upon the ground that the holder had contributed to induce the payee to believe the paper was genuine. All the cases cited in the text-books or relied on by appellant, while they criticise the rule as harsh, only make the particular case under consideration an exception to the rule, and permit the recovery by the drawee for the reason that the holder of the paper receiving the money was himself neglectful, and caused the loss, or by his conduct made the drawee believe the paper was gennine. These cases are exceptions to the rule, but all recognize the doctrine that where the parties are equally innocent the drawee paying the money must suffer the loss. The two cases —one found in 22 Neb. 769, 36 N. W. Rep. 289, of First Nat. Bank v. State Bank, and the other of People's Bank v. Franklin Bank, 12 S. W. Rep. 716—go further in discarding the rule than any cases to which our attention has been called; but in those cases the banks upon which the checks were drawn were permitted to recover upon the ground that the banks paying the checks had neglegted to make the proper inquiry as to the identity of the holder, who was a stranger, and that this was such a want of precaution as deprived the bank advancing the money of any superior equity as against the bank upon which the checks were drawn. The cobrt expressly says in the Nebraska case that the loss may therefore be traced directly to the negligence of the plaintiff in error. Whether the facts of those cases justified the conclusion reached is not necessary to inquire, as, after a careful review of all the authorities, it is found that the general doctrine fixing the liability on the drawee in such cases is fully sustained. In the case of Espy v. Bank, reported in 18 Wall. 604, the money was paid on a raised check, neither party being in fault.

While it rests upon one signing his own name, or that of a bank affixing its signature, to notes to pass as current money, to know that the signature is genuine, it also rests on a bank, where checks are drawn upon it in the name of its customer, to know his signature; and, instead of the party to whom the money is paid being required to show negligence in the bank paying the money, it devolves on the drawee to show negligence in the indorser or holder who in good faith has received the money before the drawee can escape liability. When the parties are equally innocent the drawee is the loser. There is no precedent in this court on the question. Still, we are not inclined to follow the views of text-writers, in the face of so many adjudications on the subject, and with no case presented that goes further than to modify the rule in cases where bad faith or negligence is to be attributed to the holder or indorsee when taking the check.

NEGLIGENCE — EVIDENCE OF AFTER REPAIRS.—Two recent cases have considered the subject of the admissibility in negligence cases of evidence of repairs made after the accident. One is Terre Haute & I. R. Co. v. Clem, 23 N. E. Rep. 965, decided by the Supreme Court of Indiana. The other is Lang v. Sanger, 44 N. W. Rep. 1095, decided by the Supreme Court of Wisconsin. In the first case it was held that in an action against a railroad company for injury caused by alleged negligence in the construction of its road, evidence that after the accident the company changed and repaired its road is inadmissible to show negligence. Elliott, J., says:

Evidence of repairs made after an injury has been sustained is incompetent to show antecedent negligence. This question was carefully considered by the Supreme Court of Minnesota in the case of Morse v. Railway Co., 30 Minn. 465, 16 N. W. Rep. 358, and three of the earlier decisions of that court were overruled. * * * The authorities are collected and discussed in the case of Nalley v. Carpet Co., 51 Conn. 524, and it was there said: "The fact that an accident has happened, and a person has been injured, immediately puts a party on a higher plane of diligence and duty, from which he acts with a view of preventing the possibility of a similar accident, which should operate to commend rather than condemn the person so acting. If the subsequent act is made to reflect back upon the prior one, although it is done upon the theory that it is a mere admission, yet it virtually introduces into the transaction a new element and test of negligence, which had no business there, not being in existence at the time." The question received consideration in the very recent case of Hodges v. Percival (Ill.), *ante*, 423, and in the course of the discussion the court said: "The happening of an accident may inspire a party with greater diligence to prevent a repetition of a similar occurrence, but the exercise of such increased diligence ought not, necessarily, to be regarded as tantamount to a confession of past neglect." The rule asserted in the cases from which we have quoted is declared in many other cases. Dougan v. Transportation Co., 56 N. Y. 1; Baird v. Daly, 68 N. Y. 547; Dale v. Railroad Co., 73 N. Y. 471; Salters v. Canal Co., 3 Hun, 338; Payne v. Railroad Co., 9 Hun, 526; Cramer v. Burlington, 45 Iowa, 627; Hudson v. Railroad Co.,

59 Iowa, 581, 13 N. W. Rep. 735; Ely v. Railroad Co. 77 Mo. 34.

The rule stated and enforced in the cases referred to is the only one that can be defended on principle. To declare the evidence competent is to offer an inducement to omit the use of such care as the new information may suggest, and to deter persons from doing what the new experience informs them may be done to prevent the possibility of future accidents. The effect of declaring such evidence competent is to inform a defendant that if he makes changes or repairs he does it under penalty, for, if the evidence is competent, it operates as a confession that he was guilty of a prior wrong.

In the Wisconsin case it was held that evidence in an action for injuries received through the alleged dangerous condition of a gangway in defendant's saw-mill, that defendant, after the accident, made repairs, is inadmissible, even in rebuttal of defendant's testimony that the repairs were made before the accident. Orton, J. says:

In Castello v. Landwehr, 28 Wis. 524, the bridge was repaired after the accident, and the circuit court refused to instruct the jury that they might consider that fact as evidence "that it was a needed and proper proceeding to make the bridge safe and secure." Mr. Justice Lyon, in the opinion, makes such an inference still more unreasonable and preposterous by saying: "If the fact admitted of such an inference, then the fact that a person, at a certain time, commences using and exercising extraordinary care in a given case, may be used against him to prove that, before such time, he had failed to use reasonable and ordinary care." It was held that the court did not err in refusing to give such an instruction. In Morse v. Railway Co., 30 Minn. 465, 16 N. W. Rep. 358, the supreme court of that State, after a very careful and considerate review of this rule of evidence, overruled several previous decisions of that court, the other way, and held such evidence inadmissible, for the same reason by saying in substance, that a person may have exercised all the care the law requires, and yet may afterwards have made the repairs as a measure of extreme caution. See, also, Dougan v. Transportation Co., 56 N. Y. 1; Sewell v. City of Cohoes, 11 Hun, 626; Baird v. Daly, 68 N. Y. 547; Payne v. Railroad Co., 9 Hun, 526; Salters v. Canal Co., 3 Hun, 338; Dale v. Railroad Co., 73 N. Y. 468.

LANDLORD AND TENANT—DANGEROUS PREMISES—INJURIES TO SERVANT OF TENANT.—The liability for injuries caused by a nuisance on premises let, was considered by the Supreme Court of Texas, in Perey v. Reyband, 13 S. W. Rep. 177, where it was held that a landlord, who does not covenant to repair, is not liable to a servant of the lessee injured by the falling of a cistern caused by decayed and insufficient supports, though he knew of the defect, and had promised to repair, as such promise was without consideration. Collard, J., says:

It is well settled that the owner of leased premises is liable to the public or to third persons for injuries resulting from a defective structure on the premises when the defect existed at the time the lease was made, or when he had covenanted to repair, and keep in repair. Thomp. Neg. 317; Marshall v. Heard, 59 Tex. 267; Owings v. Jones, 9 Md. 108; Grady v. Wolsner, 46 Ala. 381; Helwig v. Jordan, 53 Ind. 21. The case at bar is not an action by a stranger, but by the servant of a tenant against the owner; and in such case the rule seems to be that the landlord is liable only when he had contracted or is under obligation to keep the tenement in repair, or has been guilty of fraud or deceit which would release the tenant from his implied obligation to repair. The action in that case was against the landlord for an injury of the wife of the sublessee, and, referring to the case of Godley v. Hagerty, 20 Pa. St. 387, which held a contrary doctrine, say that, in that case, "some importance was attached to the fact that the building was erected by the defendant. This may have been regarded as proper in that case, as tending to show him guilty of fraud;" and the court proceeds to show that cases where one erects a nuisance on his premises, and afterwards parts with the possession, have no application to the case under consideration; and then concludes, that "there is no reason for holding the lessor, in the absence of any agreement or fraud, liable to the tenant for the present or future condition of the premises, that would not be equally applicable to a similar liability sought to be imposed by a grantee in fee upon his grantor." The following cases, besides those cited in the foregoing case, assert the same doctrine, that there must be an express covenant or agreement by the lessor to keep in repair, in order to make him liable to the tenant. Scott v. Simons, 54 N. H. 431; Brewster v. DeFremery, 33 Cal. 341; O'Brien v. Capwell, 59 Barb. 497. The last case cited is, in principle, like the one before us. The action was by a washerwoman in the employ of the tenant, against the landlord, and the court held that where there is no fraud, false representations, or deceit; and, in the absence of an express warranty or covenant to repair, there is no implied covenant in favor of the tenant; and, as the plaintiff stood in his place, there was no liability on the part of the landlord to her.

The authorities are abundant sustaining the doctrine that the owner cannot create a nuisance on his premises, and relieve himself of liability to a third person injured thereby, by leasing. It is also the law that he would be liable to a stranger where the defective structure causing the injury is on the premises when they are leased; but such liability would not exist in favor of the tenant, where there is no contract by the landlord to repair and no fraud, because he does not owe the tenant the duty of repairing, as he does the public and strangers. The cases cited by plaintiff, holding the landlord liable, are cases where the injury was to third persons lawfully upon the rented premises, or where the landlord owed a duty to the public to repair. The cases cited are Albert v. State, 7 Atl. Rep. 697; Ranken v. Ingwersen, 10 Atl. Rep. 545; Joyce v. Martin, *Id.* 620; Daley v. Rice, 12 N. E. Rep. 841. The first case was a suit by a minor for damages for death of parents who were drowned in consequence of the negligence of the owner of a wharf leased. The next case was a suit by a tenant of one part of a building for damages resulting from the bursting of water-pipes in another part of the building, occupied by another tenant, who had covenanted to repair, where it was held that the landlord of the tenant on whose premises the pipes were defective was liable. The next case was where the owner of a defective wharf leased it in a defective condition. It was held that he was liable

to one lawfully using it for the purposes for which it was intended. The court held both lessor and lessee liable. Daly v. Rice, the next case cited, was an action for damages by a person who, while lawfully using a way abutting leased premises, fell into a coal-hole upon the way. In none of these cases was the suit by the tenant, or the servant of the tenant, of the premises having the defective structure upon them, and none of them is authority for the proposition that the landlord would be liable to such tenant or servant, where he was under no obligation or contract to repair. The mere fact that there was a nuisance on the premises at the time the property was rented would ordinarily render the lessor accountable for damages to a stranger lawfully passing thereon, whether he contracted to repair or not; and, in case he had not so contracted, both the lessor and lessee would be liable.

It is alleged, however, in plaintiff's petition, that he did not know of the defects in the supports of the cistern, but that defendant did know the fact at and before the injury, and that at the request of her tenant, Watts, she had promised to make the necessary repairs, but had failed and refused to do so. This allegation may have been set up to show that defendant was liable, because she had so promised and contracted. The promise was merely gratuitious, not made at the time of the lease, and was no part of the original contract. It was without consideration, and could not be enforced. There is a case similar to this, where the suit was brought by the tenant. He had requested the landlord to repair a privy attached to the tenement, and the landlord agreed to do so. He, with some common laborers, attempted to make the repairs. Reported to the tenant's wife that the privy was safe. She went into it the same evening, when the floor fell through, and she was precipitated into the vault, and injured. The court, discussing the case, say: "In the ordinary contract between landlord and tenant, there is no implied warranty on the part of the former that the demised premises are in tenantable condition. He is under no obligation to make repairs, unless such a stipulation makes a part of the original contract; and any promise to do so, founded merely on the relation of the parties, and not one of the conditions of the lease, would be without consideration, and for that reason would create no liability. But, although a gratuitous executory contract of that kind would not be binding upon him, he would place himself in a very different position if he should see fit to treat it as binding, and actually enter upon its fulfillment. He is at liberty to repudiate it, or to perform it at his option; but, if his choice should be to perform it, he comes under some degree of liability as to the manner of its performance." Gill v. Middleton, 105 Mass. 478, 479, and authorities cited. We have quoted freely from this case, because it is the law of the point under consideration in the case before us, and is decisive of it. The reasoning is sound and well presented, and saves us further discussion.

DIVORCE—CRUELTY OF THE HUSBAND AS AMOUNTING TO DESERTION. — The Court of Chancery of New Jersey, in McVickar v. McVickar, 19 Atl. Rep. 249, holds that if a husband treats his wife with such extreme and persistent cruelty that her existence is rendered intolerable and her life endangered, and she for that cause separates herself from him, such treatment on his part amounts to desertion by him. Pitney, V. C., says:

The contention of the petitioner is that she was compelled to leave her husband, and to live separate from him, by his utter and complete neglect to provide for her, and his persistent and long-continued cruel treatment of her, by which her existence was rendered extremely miserable, and her life actually endangered. That such treatment of a wife by a husband will amount to desertion on his part is well settled in New Jersey. Chancellor Zabriskey in Starkey v. Starkey, 21 J. Eq. 136, says: "In all cases where a husband either actually drives his wife from himself and his house, or by his cruel and abusive treatment compels her to leave it for safety or comfort, it is an abandonment and separation by him." And again, in Laing v. Laing, 21 N. J. Eq. 249, he says: "It is a recognized principle that when a husband treats his with such cruelty or violence that she is obliged to leave him for safety, or to avoid personal injury, this compulsory flight amounts to a desertion by him; and if he does not seek his wife, and try to persuade her to return with promises of amendment, that such absence, if continued for the requisite time, is a willful and obstinate desertion on his part." And, further on: "To convert a leaving by the wife into a desertion by the husband, she must go away for her own safety, and protect herself from his violence." This language of Chancellor Zabriskie is repeated and adopted by Chancellor Runyon in Sandford v. Sandford, 32 N. J. Eq. 421. And Vice-Chancellor Van Fleet, in Skean v. Skean, 33 N. J. Eq. 151. says: "The husband may drive his wife away, or he may treat her so brutally as to compel her to flee for safety, or his conduct may be so cruel and malignant as to show that he means to force her away. If a wife, for either of these causes, separates herself from her husband, and he allows her to remain away for the statutory period without professing sorrow for his violations of conjugal duty, and promising to amend his conduct, and asking her to return, he, in the eye of the law, is the deserter, and she has a right to ask for a dissolution of the marriage tie." And again, in Weigand v. Weigand, 41 N. J. Eq. 208, 3 Atl. Rep. 699, he says: "A husband is guilty of abandonment when he compels his wife, by cruel and abusive treatment, to leave him. * * * If, in consequence of his conduct, she is compelled to leave his house, either to preserve her honor and self-respect, or to secure safety, he is the cause of the separation, and must be adjudged to be the wrong-doer." And see Marker v. Marker, 11 N. J. Eq. 256. It is not, in my judgment, a necessary ingredient in this canon that the husband should entertain, in conection with his acts of cruelty, and settled purpose to drive his wife from him. It is enough if such is the natural consequence of his acts.

CRIMINAL LAW—LOTTERY—FREE CHANCE. —The question as to what is a lottery and in what lies its legal objection, is discussed by the Supreme Court of Alabama, in Yellow Stone Kit v. State, 7 South. Rep. 338. The fact appears in that case that defendant gave exhibitions in a tent as an adjunct to the sale of patent medicines. Tickets were distributed among the audience entitling the holders to a chance for certain prizes offered. The

court held that this was not a lottery, such as to render defendant liable to indictment, as there was no consideration paid directly or indirectly for the chance of participating in the distribution. Somerville, J., says:

The case turns largely on what is to be taken as a property definition of the word "lottery," within the meaning of the statute, and the constitution of Alabama. Code 1886, §§ 4068, 4069; Const. 1875, art. 4, § 26. The word cannot be regarded as having any technical or legal signification different from the popular one. It is defined by Webster as "distribution of prizes by lot or chance." This definition is substantially adopted by Bouvier and Rapalje in their law dictionaries. Worcester defines it as "a distribution of prizes and blanks by chance; a game of hazard in which small sums are ventured for the chance of obtaining a larger value." So the American Cyclopedia thus defines a lottery: "A sort of gaming contract, by which, for a valuable consideration, one may, by favor of the lot, obtain a prize of a value superior to the amount or value of that which he risks." In Buckalew v. State, 62 Ala. 334, it was said, after citing Webster's definition, that " wherever chances are sold and the distribution of prizes determined by lot, this, it would seem, is a lottery. This, we think is the popular acceptation of the term." In Bishop on Statutory Crimes, § 952, it is said: "A lottery may be defined to be any scheme whereby one, in paying money or other valuable thing to another, becomes entitled to receive from him such a return in value, or nothing, as some formula of chance may determine." In Hull v. Ruggles, 56 N. Y. 424, the New York court of appeals adopts the following as the result of the accepted definitions: "Where a pecuniary consideration is paid, and it is to be determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to receive for it, that is a lottery." This definition is approved in Wilkinson v. Gill. 74 N. Y. 63, as the popular meaning of the word, and one proper to be adopted with a view of remedying the mischief intended to be prevented by the statutes prohibiting lotteries; and it is said: "Every lottery has the characteristics of a wager or bet, although every bet is not a lottery."

It may be safely asserted, as the result of the adjudged cases, that the species of lottery the carrying on of which is intended to be prohibited as criminal by the various laws of this country, embraces only schemes in which a valuable consideration of some kind is paid, directly or indirectly, for the chance to draw a prize. U. S. v. Olney, 1 Deady, 461, 1 Abb. (U. S.) 275; Governors, etc., v. Art Union, 7 N. Y. 228; Ehrgott v. Mayor, 96 N. Y. 264, 48 Amer. Rep. 622; Bell v. State, 5 Sneed, 507; Com. v. Thacher, 97 Mass. 583. There is no law which prohibits the gratuitous distribution of one's property by lot or chance. If the distribution is a pure gift or bounty, and not in name or pretense merely, which is designed to evade the law—if it be entirely unsupported by any valuable consideration moving from the taker,—there is nothing in this mode of conferring it which is violative of the policy of our statutes condemning lotteries, or gaming. We may go further, and say that there would seem to be nothing contrary to public policy, or *per se* morally wrong, in the determination of rights by lot. A member of the College of Christian Apostles, as sacred history informs us, was once chosen by lot. And under the law of this State a tie vote on a contested election of any State officer is required to be settled in the same mode. So our statutes authorize a distribution of property owned by joint tenants to be made by lot under the direction of the judge of probate. These are not the evils against which the law is directed. * * * The cases on this subject are very numerous, and while the courts have shown a general disposition to bring within the term "lottery" every species of gaming involving a distributon of prizes by lot or chance, and which comes within the mischief to be remedied—regarding always the substance and not the semblance of the things so as to prevent evasions of the law, we find no decision in which the element of a valuable consideration parted with, directly or indirectly, by the purchaser of a chance, does not enter into the transaction. Buckalew v. State, 62 Ala. 334; State Bryant, 74 N. C. 207; Com. v. Wright, 50 Amer. Rep. 306; Com. v. Wright, 50 Amer. Rep. 306; State v. Clarke, 66 Amer. Dec. 723; State v. Shorts, 90 Amer. Dec. 668; Wilkinson v. Gill 30 Amer. Rep. 264.

ACCIDENT INSURANCE—CONDITION — RAILROAD EMPLOYEES.—A rather novel question was involved in the decision of Cotten v. Fidelity and Casualty Co., 41 Fed. Rep. 506, by the U. S. Circuit Court for Mississippi. The question was whether the assured was a railroad employee within the meaning of the exception of the provision of an accident policy of insurance that the insurance "does not cover entering or trying to enter or leave a moving conveyance using steam as a motive power, * * * * railroad employees excepted." The fact was that the assured was a baggage checker of a transfer company. His business required him to meet and board incoming trains and check baggage to other railroad lines and to residences in Vicksburg. Judge Hill held that he was to be regarded as a railroad employee within such exception, which had reference to the character of the employment, rather than to who is the employer.

THE EXTINGUISHMENT OF AN EASEMENT.

1. An easement may be extinguished by the act of God,[1] though it has been held that an easement in an alley is not lost by the destruction of the houses for the benefit of which the easement was created.[2] Where an easement is extinguished by the act of God it may subsequently revive, as where a spring dries up and afterwards flows again; but where it is

[1] Taylor v. Hampton, 4 McCord, 96; 17 Am. Dec. 710.
[2] Chew v. Cook, 39 N. J. 396.

extinguished by the act of the party it is lost forever.[3]

2. An easement may be extinguished by operation of law.[4] If the servient and dominant estates become united in the same owner, the easement is extinguished by unity of title and possession, and cannot afterwards be claimed without a new grant.[5] The only effect of a conveyance to A of easements of which his land is servient, is to extinguish the dominant rights.[6] But in order to operate as an extinguishment, the estates thus united must be respectively equal in duration and not liable to be again disjoined by the act of law.[7] If a person holds one estate in severalty and only a fractional part of the other, as a leasehold for 99 years, the easement is not extinguished.[8] One having an easement over certain lands to reach a parcel of his real property, is not obliged to surrender such right on becoming the owner of other realty over which he might pass to the first mentioned land.[9] So an easement is not extinguished by unity of title in the dominant and servient estates in the same person, where it is essential to the enjoyment of the estate, as in case of an easement of drainage, unless while the estates are united the easement is actually severed.[10] So, a right of way appurtenant is not extinguished by merger in the mortgagee taking possession of the dominant and servient estates under separate mortgages for the purposes of foreclosure but conveying one of the estates before foreclosure.[11] And where a person holds land by a defective title and an easement in the same land by a valid title, the easement is not extinguished by unity of possession.[12] An owner of an easement does not, by asserting a right to the fee of the servient estate and by taking possession thereof, destroy his right to the easement.[13] The division of the dominant estate does not destroy the easement, and the owner or assignee of any portion of that estate may claim the right, so far as it is applicable to his part, provided the right can be enjoyed as to the separate parcels without any additional charge or burden to the proprietor of the servient tenement.[14] In Massachusetts, the owner of land having leased a stone quarry thereon for a term of years, conveyed the land, reserving the use of the quarry until the expiration of the lease. During the continuance of the term the lease was cancelled by consent. It was held that this did not extinguish the reservation, but that it would continue until the end of the term.[15] Where the particular purpose for which the easement was granted has been served the easement becomes extinguished.[16] But it has been held in Massachusetts that an easement created by grant does not cease although the necessity for it ceases. Thus, where the owner of an upper and a lower mill privilege conveyed the upper privilege, reserving for the benefit of the lower privilege all the water which could be drawn through the waste gate when the water ran over the rolling dam, the reservation was deemed general, however the lower privilege might afterwards be used.[17] A right of way to a certain building is lost by laying out and constructing a highway over their site.[18] Easements which are apparent and continuous and which are technically extinguished by unity of title and are allowed to remain undisturbed, revive upon severance.[19] In Kieffer v. Imhoff,[20] the title of two houses having a right of way in an alley between them vested in one proprietor. He and his tenants continued the use of the alley. Both were seized and sold at a sheriff's sale to different purchasers. It was held that the easement revived on the

[3] Taylor v. Hampton, 4 McCord, 96; 17 Am. Dec. 710.
[4] Taylor v. Hampton, *supra*.
[5] Coleman's Appeal, 62 Pa. St. 274; Screaven v. Gregoire, 8 Rich. (L) 158; 64 Am. Dec. 747; Howell v. Estes, 71 Tex. 690; Mott v. Mott, 15 N. Y. S. C. 474; Ritger v. Parker, 3 Cush. 147; Plympton v. Converse, 42 Vt. 712; Atwater v. Bodfish, 11 Gray, 150; Warren v. Beake., 54 Me. 276; Livingston v. Ten Brock, 16 Johns, 14; 8 Am. Dec. 287.
[6] McAllister v. Devane, 76 U. C. 57.
[7] Ritger v. Parker, 8 Cush. 147; 54 Am. Dec. 744; Bradley Fish Co. v. Dudley, 37 Conn. 136; Ivimey v. Stocker, Law R. 1 Ch. 396; Pearce v. McClenaghan, 5 Rich. (L) 178; 55 Am. Dec. 710.
[8] Atlanta Mills v. Mason, 120 Mass. 244; Dority v. Denning, 73 Me. 381.
[9] Zell v. Univ. Soc., 119 Pa. St. 390; 4 Am. St. Rep. 654.
[10] Ferguson v. Witzell, 5 Rich. (L) 289; 57 Am. Dec. 744.
[11] Ritger v. Parker, 8 Cush. 145; 54 Am. Dec. 744.
[12] Tyler v. Hammond, 11 Pick. 193.
[13] White's Bank v. Nichols, 64 N. Y. 65.
[14] Hills v. Miller, 3 Paige Ch. 254; 24 Am. Dec. 219.
[15] Farnum v. Platt, 8 Pick. 339; 19 Am. Dec. 330.
[16] Nat., etc. Co. v. McDonald, 4 H. & N., 8; Chase v. Sutton Man. Co., 4 Cush. 152.
[17] Atlanta Mills v. Mason, 120 Mass. 244.
[18] Hancock v. Wentworth, 5 Metc. 446. See Ashley v. Hall, 119 Mass. 526; Central Wharf Co. v. India Wharf, 128 Mass. 567.
[19] Hurlburt v. Firth, 10 Pa. St. (Phila.) 135.
[20] 26 Pa. St. 438.

severance of title. In a recent Rhode Island case A mortgaged an estate reserving the right to release certain easements over an adjoining strip of land which had been created by a predecessor in title. The mortgage contained certain powers of sale authorizing the mortgagee or his assignee to sell for condition broken, and to convey the mortgaged estate absolutely and in fee-simple to the purchaser. The assignee of the mortgagee sold and conveyed under the powers. The supreme court held that the purchaser was entitled to the estate with the easements over the adjoining strip; that A's reserved right to release the easements was extinguished by the sale; that a release given by A after the sale was void, and A, during his occupancy of the estate as owner, was also tenant of the adjoining strip; and that during A's possession of both dominant and servient estates the easements were temporarily suspended.[21]

3. An easement may be lost or determined by the positive act of the party himself.[22] An easement cannot be extinguished or renounced by a parol agreement between the owner of the dominant and the servient tenement,[23] except where parol license granted by the owner of the dominent tenement is executed by the owner of the servient tenement.[24] An agreement made by a lessee for years to abandon an easement belonging to the estate does not bind the reversioner, unless he is a party to it, or it is made with his knowledge and acquiescence.[25] It may be extinguished of course by a release.[26] If tenants in common of an estate, including a mill privilege, make partition and execute mutual deeds of release which stipulate that neither shall "claim any right or title to the aforesaid premises or their appurtenances or to any part or parcel thereof forever," this is an extinguishment of the privilege.[27] In a New York case, the plaintiffs conveyed a lot mortgaged to M, reserving an easement for light and air of their adjacent church, M assuming the mortgage. M conveyed the premises subject to the mortgage to a third person who did not assume the mortgage. On foreclosure M's grantee purchased the premises. It was held that the purchaser got absolute title unincumbered by the easement.[28] An executed license to obstruct an easement may amount to proof of an abandonment of the easement. Such a license is not revocable; but when the obstruction erected in pursuance of such specific license is removed, the owner of the servient tenement cannot erect another obstruction of the same or of a different kind without a new license.[29] It may be lost by encroachment.[30] Actual obstruction of a private right of way, as by inclosing and cultivating it for ten years, extinguishes the right thereto,[31] and it may be lost by abandonment.[32] A party who has consented to forego the use of a right of way or other easement either temporarily or permanently, and suffered other persons to act upon the faith of that consent and to incur expense in doing the very act to which his consent was given, cannot retract such consent or throw on those relying upon his good faith the burden of restoring things to their former state and condition.[33] But to amount to an abandonment of an easement without a release by the owner of the dominant tenement, the proof must show: 1. That the acts were voluntarily done by the owner of the dominant tenement or by his express authority; 2. That such party was the owner of the inheritance and had authority to bind the estate by his grant or release; 3. That the acts are of so decisive and conclusive a character as to indicate and prove his intention to abandon the easement.[34] Whether an easement has been abandoned depends on intention which is a question of fact.[35] Abandonment of a right of way is more readily presumed where the easement is granted for the public benefit than where it is held for private use. Thus, non-user of a street railway for more than ten years is sufficient

[21] *Re* Bull, 15 R. I. 534.
[22] Laurence v. Obee, 3 Camp. 514; Vogler v. Geiss, 51 Md. 407; Crain v. Fox, 16 Barb. 184.
[23] Dyer v. Sanford, 9 Metc. 395.
[24] Morse v. Copeland, 2 Gray, 302.
[25] Glenn v. Davis, 35 Md. 208; 6 Am. Rep. 389.
[26] Coleman's Appeal, 62 Pa. St. 274; Pope v. Devereux, 5 Gray, 408.
[27] Hamilton v. Farrar, 128 Mass. 492.
[28] Rector, etc. v. Mack, 93 N.Y. 488; 45 Am. Rep. 260.
[29] Dyer v. Sanford, 9 Met. 395; 43 Am. Dec. 399.
[30] Eliott v. Rhett, 5 Rich. (L) 405; 57 Am. Dec. 750.
[31] Bowen v. Team, 6 Rich. (L) 298; 60 Am. Dec. 127.
[32] Dana v. Valentine, 5 Metc. 14; Parkins v. Dunham, 3 Strobh. 224; Louisville, etc. Co. v. Covington, 2 Bush, 522; Camy v. Andrews, 123 Mass. 155; Dyer v. Sandford, 9 Metc. 395; Pope v. Devereux, 5 Gray, 409; Queen v. Chorley, 12 Ad. & Ell. N. S. 515; Moore v. Rawson, 3 B. & C. 332.
[33] Vogler v. Geiss, 51 Md. 407.
[34] Dyer v. Sandford, 9 Metc. 395; 43 Am. Dec. 399.
[35] Polson v. Ingram, 22 S. C. 541.

evidence of abandonment, so that the State could grant it to another corporation.[36] Where a party accepts a conveyance containing an express reservation of an easement for the benefit of an adjoining house, he and those claiming in privity of estate with him are precluded from setting up a prior abandonment of such easement to their predecessor in interest.[37] The easement may be lost by non-user.[38] But non-user is only *prima facie* evidence of an intention to abandon.[39] In the case of private ways, non-user for twenty years affords conclusive evidence that the right to them never existed or has been extinguished in favor of some adverse right.[40] But where the right is claimed by deed mere non-user for any length of time will not impair or defeat it.[41] The non-user to have that effect must be in consequence of something which is adverse to the user on the part of the owner of the servient estate and continued for the period of prescription.[42] So long as the conduct and situation of the parties are consistent with the written title under which they claim they will be presumed to hold under it and according to its terms.[43] An easement may be determined by any act of the party incompatible therewith.[44] The owner of the dominant estate may make such changes in the use and condition thereof as to renounce the easement,[45] and this may be relied on by the owner of the servient estate as an abandonment.[46] A mere abuse of the right, such as using a way for a purpose not included in the right, is only a trespass and the right remains. But where a way had been laid out for the common use of lots bounded on it, and A, the owner of one of these lots, had appropriated to his own use the part of the way opposite his lot, it was held that A had abandoned his easement, and could not maintain an action against the owner of another of the lots for obstructing the way.[47] A right of way is not extinguished by its owner's habitual use of another equally convenient unless there is an intentional abandonment of the former.[48]

JOHN D. LAWSON.

[36] Henderson v. R. Co., 21 Fed. R. 358.
[37] Dyer v. Sandford, 9 Metc. 395; 43 Am. Dec. 399.
[38] Jennison v. Walker, 11 Gray 425; Farrar v. Cooper, 34 Me. 400; White v. Crawford, 10 Mass. 183; Pillsbury v. Moore, 44 Me. 154; Wilder v. St. Paul, 12 Minn. 208; Chandler v. Jamaica Pond, etc. Co., 125 Mass. 544; Thompson v. Myers, 34 La. Ann. 615.
[39] Pratt v. Sweetzer, 68 Me. 344.
[40] Webber v. Chapman, 42 N. H. 326; 80 Am. Dec. 111.
[41] Arnold v. Stevens, 24 Pick. 106; Loudenyck v. Anderson, 59 How. Pr. 1; Riehle v. Hanlings, 38 N. J. 20; Eddy v. Chace, 140 Mass. 471; Tyler v. Cooper, 47 Hun, 94.
[42] Jewett v. Jewett, 16 Barb. 150; Farrar v. Cooper, 34 Me. 400; Chandler v. Jamaica Pond, 125 Mass. 544; Bannon v. Angier, 2 Allen, 128; Hall v. McCaughney, 51 Pa. St. 43; Nitzell v. Paschall, 3 Rawle, 76; Pope v. O'Hara, 48 N. Y. 446: Snell v. Levitt, 39 Hun, 227.
[43] Doe v. Butler, 3 Wend. 149.
[44] Boone Real Prop. 147.
[45] Dyer v. Sandford, 9 Metc. 395; 43 Am. Dec. 399.
[46] Jones v. Tapling, 11 C. B. N. S. 283; Ganit v. Sharp, 3 Ad. & Ell. 325.
[47] Steere v. Tiffany, 13 R. I. 568.
[48] Jamaica Pond, etc. Corp. v. Chandler, 121 Mass. 3.

RECENT ENGLISH CASES.

LIEN FOR MONEYS ADVANCED TO KEEP UP LIFE POLICIES.

Two recent cases, *Re* Earl of Winchelsea's Policy Trusts, L. R. 39 Chanc. Div. 168, before Mr. Justice North, and Strutt v. Tippett, before the court of appeal on January 30, show how dangerous it is for a stranger to advance moneys for keeping up a life-policy in the expectation of obtaining a lien thereon for his advance, unless it is made upon the request (express or implied) of the beneficial owner of the policy.

In re Leslie; Leslie v. French, L. R. 23 Chanc. Div. 552, in a judgment of Lord Justice Fry (written after he had been appointed a Lord Justice of Appeal, but which Mr. Justice Pearson adopted as his own), it is said, page 560: "In my opinion a lien may be created upon the moneys secured by a policy by payment of premiums in the following cases: First, by contract with a beneficial owner of the policy; secondly, by reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation; thirdly, by subrogation to this right of trustees of some person who may at their request have advanced money for the preservation of the property; fourthly, by reason of the right vested in mortgagees or other persons having a charge upon the policy to add to their charge any moneys which have been paid by them to preserve the property." In The Earl of Winchelsea's Policy Trusts, L. R. 39 Chanc. Div. 172, Mr. Justice North observed: "The principles enunciated by Lord Justice Fry in *Re* Leslie were in substance adopted by the court of appeal in Falcke v. The Scottish Imperial Insurance Company, L. R. 34 Chanc. Div. 234, and I think the court intended to lay down exhaustively all the cases in which a person not the sole benefical owner of a policy, who pays a premium in respect of it, is entitled to a lien upon the proceeds of the policy for the amount which he has paid." But in Strutt v.

Tippett, although the court held that the stranger who had there paid premiums had not any lien (a decision which seems to have been founded mainly on a special agreement), it would seem that Lord Justice Lindley was of opinion that the list of cases in *Re* Leslie in which a lien could be obtained was not necessarily exhaustive.

In The Earl of Winchelsea's Case policies on his life (and apparently in his name) were assigned by way of mortgage, the equity of redemption being reserved to the earl. A term in real estate was vested in trustees in trust, among other matters, out of the income, to keep down the interest and the premiums on the policies. The earl became bankrupt, and sometime afterwards died. Meanwhile, the rents being insufficient to provide for payment of a premium, the trustee of the term had advanced the requisite amount to save the policy from lapse. It did not appear that this advance was made at the request either of the mortgagees or of the trustee in bankruptcy (it is not stated whether it was made with the knowledge of the latter). The trustee of the term claimed the application of a fund in court, representing the balance of the policy moneys which remained after satisfying the mortgage, towards repayment of the premium. Mr. Justice North held that the case was not within the second rule in *Re* Leslie. The trustee of the term had "no trust and no duty in respect of the policy moneys." And the trustee in bankruptcy was declared entitled to the fund.

It would seem that notice of an intended payment of a premium might be important, as in West v. Reid, 2 Hare, 249, where, the mortgage of a policy being contested by the assignees in bankruptcy of the mortgagor, the solicitors of the mortgagees offered to pay a premium then coming due, if authorized to do so by the assignees; they, however, declined to interfere. The premiums were, in fact, paid by the mortgagees till the life dropped, and it was held that the mortgagees, though not entitled to the policy itself, had a lien for the premiums so paid, with interest. Lord Justice Cotton (L. R. 34 Chanc. Div. 244), referring to the case, thinks "it might well be held that there are circumstances from which the law would imply a request or a contract to pay these premiums if the policy ultimately turned out to belong to the assignees and not to the party making the payment"; and Lord Justice Bowen observes (p. 249): "Wherever you find that the owner of the property saved knew of the service being performed, you will have to ask yourself (and the question will become one of fact) whether under all the circumstances there was either what the law calls an implied contract for repayment or a contract which would give rise to a lien." Lord Justice Fry, in *Re* Leslie, L. R. 23 Chanc. Div. 561, refers to that law relating to "confusion:" "If I pour my gold into your heap, or put my silver into your melting-pot, or turn my corn into that in your granary, I have no right to an account or any relief against you;" but in Colwill v. Reeves, 2 Campbell, 576, Lord Ellenborough assigns as a reason because "it is impossible to distinguish what was mine from what was yours;" but such a reason seems inapplicable to a premium, where the amount must be known. And according to 2 Blackstone 405 (Kerr's ed. vol, ii p. 358), "if the mixture be by consent, both proprietors have according to the English as well as the the civil law, an interest in common in proportion of their respective shares."

As Lord Justice Cotton observes in L. R. 34 Chanc, Div. 241, a man who "does work upon a house without request gets no lien on the house for the work done." But in that case the house remains in existence, and to give such a lien would be to allow the stranger "to improve the owner out of his property." As to a policy, however, unless the premium is paid, the policy drops, and it would seem to on this ground that claims for "salvage" have been urged. "It is said to be contrary to natural equity that one person should gain by another man's loss" (L. R. 23 Chanc. Div. 562), and possibly the maxim, "*Qui sentit commodum sentire debet et onus*," may give one reason why the question of lien has been so often mooted. Lord Justice Fry, L. R. 34 Chanc. Div. 254 (like Vice-Chancellor Kindersley in Aylwin v. Witty, 30 Law J. Rep. Chanc. 860), doubts whether the term salvage can with propriety be applied to cases of this description. At all events, a person entitled to an interest in an equity of redemption cannot claim a lien for payment of premiums as against his mortgagee (Falcke v. The Scottish Imperial Insurance Company, L. R. 31 Chanc. Div. 243), for "it would be strange indeed if a mortgagor, expending money on the mortgaged property, could establish a charge in respect of that expenditure in priority to the mortgage." Compare Otter v. Lord Vaur, 6 D. M. G. 838.

COURTS — NON-RESIDENTS — RIGHT TO SUE.

COFRODE V. GARTNER.

Supreme Court of Michigan, January 31, 1890.

1. *Courts — Jurisdiction — Entertaining Cause.*— When one non-resident sues another non-resident on a transitory cause of action, a voluntary appearance without service of process gives the court jurisdiction, and the court is bound to entertain the cause.

2. *Constitutional Law—Suits by Non-residents.*— Under article 4, section 2 of the United States Constitution, a citizen of any State has the same right to institute suits in the courts of another State that the citizens of such State have.

Application by Joseph H Cofrode and another for *mandamus* to George Gartner, circuit judge of Wayne county, to compel him to entertain a suit against Walston H. Brown, Columbus R. Cummings, Samuel Thomas, and William B. Howard, all the parties to the suit being non-residents of

the State, the defendants having appeared without service of process and the suit being brought on a contract to be performed in another part of the State.

CHAMPLIN, C. J.: On the 7th day of December, 1889, the relators commenced suit in the circuit court for the county of Wayne by filing a declaration against Walston H. Brown, Columbus R. Cummings, Samuel Thomas, and William B. Howard. On December 16, 1889, defendants appeared in said cause by their attorneys, and demanded a bill of particulars, which was furnished on the same day. The defendants also pleaded the general issue, with notice of recoupment of which they furnished a bill of particulars. After the cause was at issue it was regularly noticed for trial by the plaintiffs' attorneys, and placed upon the docket for trial by jury at the January term of said court. On December 23, 1889, the defendants filed an affidavit in support of a motion for a struck jury, which came on to be heard on the 7th day of January, A. D. 1890, before Hon. George Gartner, circuit judge for the county of Wayne. The plaintiff opposed the motion, and filed an affidavit in opposition thereto. The motion was submitted to the court, and without deciding it the said circuit judge on the 13th day of January, 1890, of his own motion made an order striking the case from the docket on the ground that all the parties to the suit were non-residents; a copy of which order is as follows: "[Title of court and cause]. The application for a struck jury heretofore made in this cause having been duly considered, it satisfactorily appearing to the court that the parties to this action are non-residents, and that the cause of action and the subject-matter thereof arose in the upper peninsula of this State, it is ordered that said cause be, and it hereby is, stricken from the docket." The plaintiffs are both residents of the State of Pennsylvania. Three of the defendants are residents of New York; one, of Illinois.

The controversy respecting which suit is brought arises under a contract for building a railroad in this State in the upper peninsula. Early in the year 1888 the plaintiffs commenced suit by attachment in the county of Marquette, but, for reasons stated in the petition for a *mandamus*, that suit was discontinued, and this commenced by mutual understanding, on the agreement of the parties. The relators pray that a writ of *mandamus* issue to said circuit judge, directing him to vacate the above order striking the case from the docket. In showing cause why the *mandamus* should not be granted, Judge Gartner sets out the opinion rendered by him at the time he ordered the case struck from the docket, as follows: "Upon the application made for a struck jury, it was made to appear that the plaintiffs were residents of and do business in the city of Philadelphia, and the defendants in the city of New York. The subject-matter of the controversy arose and is located in the upper peninsula of this State. This is shown in the affidavit of counsel wherein it is stated: 'Affiant further says that all the parties to this suit are non-residents of this State; * * * that the transaction involved in this suit arose in the upper peninsula of Michigan. It appears that the declaration was filed December, 7, 1889, and the plea December 16th following. No process ever issued out of this court in said matter nor was service had, and it is apparent that this forum wherein to litigate and determine this controversy is by consent of counsel, and selected for convenience.' The suit involves a large amount of money, the claim in the declaration being $1,000,000; and several weeks will have to be consumed in the trial thereof, involving the county in expense of thousands of dollars and in a matter wherein the county has no interest, either in the parties or the subject-matter. It certainly does not seem right that the people of this county should be made to bear the burden of expense of determining controversies between foreign litigants. The docket of this court is crowded, and we have more than we can do in determining matters wherein the jurisdiction of the court is undoubted. This case has no business here, and an order will be entered striking it from the docket." He further states as follows: "That on information and belief this respondent states the fact to be that the relators were not obliged to come into this State to prosecute their right of action against said defendants. Neither did they causually find them, or any of them, in this State, * * * nor was the appearance or plea entered by the said defendants, or any of them, in obedience to any process issued out of said circuit court, nor in obedience to any notice of rule to plead indorsed upon a copy of the declaration filed in said circuit court as commencement of suit, * * * but said declaration and plea were filed, and said appearance was entered, in accordance with the previous stipulation of the parties." He further alleges that there are 922 cases upon the docket, of which 713 are for trial by jury at the present term, exclusive of criminal cases; that the circuit court is overcrowded with business, and that the disposition of causes in said circuit court is delayed because of the crowded state of its docket; that the trial of the alleged cause would consume at least a month of the time of the judges and jury, and in that way would seriously interfere with the disposition of the legitimate business of the court, besides entailing upon the county of Wayne an expense of many thousands of dollars; and that he made the order complained of because he deemed the same in the interest of the administration of public justice and of the public welfare. He summarizes his reasons for striking the cause from the docket as follows: "(1) That the said circuit court has no jurisdiction of the said alleged cause. (2) That the consent of parties and their attorneys does not and cannot confer jurisdiction upon said court, inasmuch as all parties, both the alleged plaintiffs and the alleged defendants, are non-residents of this

State. (3) That, if jurisdiction can be conferred by consent of parties and attorneys it does not become obligatory upon the court to entertain jurisdiction, but whether the same shall be entertained or not by the court it a matter which rests in the sound discretion of the court; and that public convenience and interest are paramount to the private convenience of the parties. (4) That it is apparent from the facts set out that the said alleged suit is brought into the circuit court for the county of Wayne for the convenience of the parties and their attorneys only."

I shall consider these reasons in the order named by the circuit judge.

First as to the jurisdiction of the circuit court. The several circuit courts in this State are courts of general jurisdiction. The cause of action stated in the declaration is transitory. It is action of *assumpsit*, arising out of a contract claimed to have been performed in this State and the circuit court for the county of Wayne has cognizance of suits upon contracts like the one sued upon irrespective of the locality of their origin, provided the parties, by service of process or otherwise, are before the court. Thompson v. Association, 52 Mich. 522, 18 N. W. Rep. 249. Were the parties properly before the court? The suit was not commenced by either of the two methods authorized by section 7291, How, St. The petition asserts that the suit was commenced by the filing of a declaration (and a copy is attached to the petition). In so doing the plaintiffs submitted themselves to the jurisdiction of the court, as a party to the record (People v. McCaffrey, 75 Mich. 115, 42 N. W. Rep. 685); and the defendants, by appearing and pleading to the declaration, voluntarily submitted themselves likewise to the jurisdiction of the court. While it is true that no consent of parties can give a court jurisdiction of the subject-matter of a suit which the court did not possess without such consent, it is equally true that a court can obtain jurisdiction over the person by the consent of such person; and service of process is always treated as waived by a general appearance in the cause, and pleading to the merits. And this is so although the defendant is a non-resident, and suable only in a particular place. Thompson v. Association, 52 Mich. 522, 18 N. W. Rep. 247. There is no claim or pretense that this is a fictitious suit, or that it is not brought in good faith to determine a genuine controversy of vital interest to the parties concerned. Section 7547 of Howell's Statutes enacts that issues of fact in actions upon contracts shall be tried in the county where one of the parties shall reside at the commencement of suit, unless for the convenience of parties and their witnesses, or for the purposes of a fair and impartial trial, the court shall deem it necessary to order such issues to be tried in some other designated county. This provision, however, applies only to residents. We held in Atkins v. Borstler, 46 Mich. 553, 9 N. W. Rep. 850, that the statute does not apply to non-resident defendants, nor to a resident plaintiff suing a non-resident defendant, from the necessity of the case; that if a non-resident could not be sued in any county where he could be found, he could not be sued at all. In that case the plaintiff was a non-resident of the county where the suit was brought, and the defendant was a non-resident of the State. The action was transitory, and we held the court had complete jurisdiction.

Whether courts ought to take jurisdiction in suits between aliens, when the cause of action arose in a foreign country is not the question in dispute here. If it were, I should be willing to follow the views expressed by Chief Justice Marshall in Mason v. The Blaireau, 2 Cranch, 240. In that case the want of jurisdiction was urged, and in delivering his opinion he said: "These doubts seem rather founded on the idea that, upon principles of general policy, this court ought not to take cognizance of a case entirely between foreigners, than from any positive incapacity to do so. On weighing the considerations drawn from public convenience, those in favor of the jurisdiction appear much to overbalance those against it, and it is the opinion of this court that, whatever doubts may exist in a case where the jurisdiction may be objected to there ought to be none where the parties assent to it." In suits between foreigners, brought in our courts, the courts are not obliged to entertain jurisdiction. They may and usually do so upon principles of comity, and seldom decline, except through a fear that they may not be capable of doing full and exact justice through a want of knowledge of the laws of the place where the cause of action arose, which enter into and make a part of the contract, or affect the rights and remedy of the parties. In Railway Co. v. Miller, 19 Mich. 305, the plaintiff was a resident of Canada, and brought suit against the railroad company in Wayne circuit court, in Michigan, for a trespass to his person committed in Canada. The defendant appeared voluntarily. It was objected that the court erred in taking and exercising jurisdiction. This court said: "The voluntary appearance of the defendant below renders any discussion of the subject of the venue unnecessary. There can be no doubt that the locality of the trespass does not of itself oust the jurisdiction. where the court has lawfully obtained control over the parties. But where the parties are not residents of the United States, and the trespass was committed abroad, the right of action in our courts can only be claimed as a matter of comity, and they are not compellable to proceed in such cases." In Roberts v. Dunsmuir, 75 Cal. 203, 16 Pac. Rep. 782, suit was brought by one subject of Great Britain against others of that kingdom. upon a cause of action in tort arising in British Columbia. At the time of bringing the action the plaintiff and one of the defendants resided in the State. Two of the defendants were non-residents, and were not served, but they filed a petition to have the cause remanded to the United States court, and had procured an extension of time to

answer after such appearance. The court below dismissed the suit, on the ground of want of jurisdiction. The supreme court reversed this ruling, holding that the court had jurisdiction. See, also, as to jurisdiction over non-resident defendant, Peabody v. Hamilton, 106 Mass. 217; Molyneux v. Seymour, 76 Amer. Dec. (note), 667; Whart. Confl. Law, §§ 738, 739; Smith v. Gibson, 83 Ala. 284, 3 South. Rep. 321; Roberts v. Knights, 7 Allen, 449; Barrell v. Benjamin, 15 Mass. 354; Miller v. Black, 2 Jones (N. C.), 341; Stramburg v. Heckman, Busb. 250; McCormick v. Railroad Co., 49 N. Y. 303; Campbell v. Wilson, 6 Tex. 379. The case of McCormick v. Railroad Co., *supra*, was a case where a non-resident of the State of New York sued a foreign corporation upon a cause of action which was transitory in its nature, and arose in another State. The defendant had appeared voluntarily by attorney. Mr. Justice Folger said: "We hold that, where the court has the jurisdiction of the subject-matter or cause of action, that consent may confer jurisdiction of the person, and that such consent may be expressed by a foreign corporation by appearing by attorney and answering generally in the action."

The next reason given by the circuit judge is that if jurisdiction is conferred by consent it does not become obligatory upon the court to entertain jurisdiction, The correctness of this position must depend upon the right of the plaintiff to seek redress in the courts of the State. If a party has a right to plant his suit in a circuit court of this State, the circuit judge has no discretion to exercise in the matter. He cannot say to one suitor, "I will retain your suit," and to another, "I will dismiss it." It is among the fundamental rights of a people under one government that they may be secured in the acquirement, possession, and enjoyment of property, and for this purpose courts are instituted as part of the organic law, in which every person shall have his remedy by due process of law. It is secured as a privilege to which every citizen of the United States is entitled. The redress of wrongs and the means of enforcing contracts are of the greatest consequence to the citizen of every State. Article 4, § 2, of the constitution of the United States, declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." In commenting upon this clause of the constitution, the supreme court of the United States in Conner v. Elliott, 18 How. 593, said: "We do not deem it needful to attempt to define the meaning of the word 'privileges' in this clause of the constitution. It is safer and more in accordance with the duty of a judicial tribunal to leave its meaning to be determined, in each case, upon a view of the particular rights asserted and denied therein. * * * It is sufficient for this case to say that, according to the express words and clear meaning of this clause, no privileges are secured by it, except those which belong to citizenship." The right to bring suit in the several courts of this State having jurisdiction is a privilege of every citizen of this State. Especially is this true with reference to the enforcement of contracts. A citizen of another State may come into this and acquire and enjoy property. He may inherit and transmit property. He may enter into contracts, to the same extent that a citizen of this State can do so, and in this his rights are guaranteed by the above provision of the constitution; and I think that his right to bring suit in this State, in any case where a citizen of the State may, is also guaranteed and protected by this provision of the constitution. This right does not depend upon the fact of the defendants having property in this State which can be reached by execution. There are many cases where, in a suit between citizens of this State, there can be no property found out of which to satisfy an execution; nevertheless the plaintiff has a right to plant his suit, litigate his claims, and obtain judgment. Wilson v. Fire-Alarm Co. (Mass.), 20 N. E. Rep. 318.

The fourth reason set out by the circuit judge affords no excuse for his declining to hear the case. None of the reasons alleged appear to me to be valid reasons for refusing to hear the case, or for striking it from the docket. No court or judge has a lawful right to deny to suitors the privilege of bringing and prosecuting their suits, upon the ground that to entertain them will entail expense upon the county. The parties were rightfully before the circuit court for the county of Wayne. The court had full jurisdiction of the parties and the subject-matter, and the circuit judge was in error, holding that the court had no jurisdiction, or that it had a discretion whether to entertain the suit or not. A *mandamus* must issue as prayed for, directing Hon. George Gartner circuit judge for the county of Wayne, to reinstate said cause upon the calendar of said court.

NOTE.—It is well settled, as stated in the principal case, that a voluntary appearance dispenses with the necessity of the service of process and that the court thereby obtains jurisdiction over the person of the defendant.[1] But neither appearance nor consent can confer jurisdiction over the subject-matter,[2] unless the cause of action is transitory, when jurisdiction of the person gives jurisdiction of the subject-matter.[3]

Declining Jurisdiction.—Courts have often declined jurisdiction of transitory suits between foreigners, when the cause of action occurred outside of their jurisdiction, as stated in the principal case, and in some cases where the litigants were residents of other States.[4] In the last case (Molony v. Dows) the court decided that it had no jurisdiction in a suit between non-residents for personal torts committed in another

[1] Jones v. Jones, 108 N. Y. 415; Miller v. Warden, 111 Pa. St. 300; Zitske v. Goldberg, 38 Wis. 216; U. S. v. Yates, 6 How. 605; Herndon v. Ridgway, 17 How. 424; Marqueze v. LeBlanc, 29 La. An. 194.

[2] Piano Mfg. Co. v. Basey, 69 Wis. 246; U. S. v. Yates, *supra*; Jones v. Jones, *supra*.

[3] Zitske v. Goldberg, *supra*; Hale v. Lawrence, 21 N. J. L. 714.

[4] Burdick v. Freeman, 46 Hun, 138; Molony v. Dows, 8 Abb. Pr. 316.

State. This case has been overruled as to cases where either party is a citizen of the United States, on the ground that the United States constitution required such jurisdiction to be exercised, which the court had overlooked.[5]

It is a general rule that where a court or any other authority has jurisdiction conferred on it, it must exercise it, when public or private interests call for such exercise, even though the language of the law conferring the authority is permissive. In such cases "may" is construed to mean "must."[6]

Constitutional Provisions.—The constitution of the United States provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.[7] The courts have been loath to define the meaning of this provision, preferring to leave it to be determined for each case as it may arise.[8] It has been considered not to apply to laws, requiring non-residents to give security for costs in suits,[9] or authorizing attachment of property in suits in the case of non-residents.[10] It was held not to protect citizens of one State in dredging or fishing for oysters in the navigable waters of another State, which by law forbade their so doing. This was on the ground that such fishing was a common of fishery belonging to the citizens of the State as a property right.[11] The discriminations in State statutes of limitation relative to non-residents are considered not to be unconstitutional.[11] In some cases laws making distinctions have been upheld, because the distinctions were between residents and non-residents, and not between the citizens of various States, as such.[13] We do not believe such a view will be sustained in the highest court of the land. The right to sue in the courts of any State, in order to protect and adjudicate one's rights, is considered to be one of the fundamental rights protected by the above mentioned constitutional provision; and though the States may impose certain provisions on non-residents, deemed necessary for the protection of its citizens, yet they cannot debar citizens of other States from seeking the protection of their rights in the local tribunals.[14]

Courts of equity, however, have more discretion, and can decline jurisdiction, leaving the parties to the legal tribunals, when, from the circumstances of the case, they cannot do full justice between the parties.[15]

S. S. MERRILL.

[5] DeWitt v. Buchanan, 54 Barb. 31.

[6] Macdougall v. Paterson, 11 C. B. 773; Alderman Blackwell's Case, 1 Vern. 152; *In re* 34th St. R. Co., 102 N. Y. 343; Mayor of N. Y. v. Furze, 3 Hill, 612; State v. Newark, 4 Dutch. 491; Atty.-Gen. v. Lock, 3 Atk. 164; People v. Supervisors, 68 N. Y. 114.

[7] U. S. Const. art. 4, § 2.

[8] Conner v. Elliott, 18 How. 593; McCready v. Virginia, 94 U. S. 391.

[9] Haney v. Marshall, 9 Md. 194.

[10] Campbell v. Morris, 3 Harris & McH. 535.

[11] McCready v. Virginia, 94 U. S. 391; Corfield v. Coryell, 4 Wash. C. C. 371.

[12] Chemung Canal Co. v. Lowery, 93 U. S. 72.

[13] Robinson v. Ocean S. N. Co., 112 N. Y. 315; Adams v. Penn Bank, 38 Hun, 393; Lemmon v. People, 20 N. Y. 562; Frost v. Brisbin, 19 Wend. 11.

[14] Davis v. Pierse, 7 Minn. 13; Morgan v. Neville, 74 Pa. St. 52; Ward v. Maryland, 12 Wall. 418; Corfield v. Coryell, 4 Wash. C. C. 371.

[15] Smith v. Mutual L. I. Co., 14 Allen, 336; Pierce v. Equitable L. I. Co., 145 Mass. 56; Wilson v. Martin-Wilson, etc. Co., 149 Mass. 24.

CORRESPONDENCE.

THE KEMMLER CASE IN THE UNITED STATES SUPREME COURT.

To the Editor of the Central Law Journal:

Permit me to express surprise that in your excellent journal, which I read regularly and with great profit, I should find (on p. 386, in note as to Kemmler's case) countenance given as to the idea that the federal courts can properly inquire into the question whether execution by electricity is "cruel and unusual" punishment. I had supposed that it was only editors of lay papers who entertained at this day the notion that the first ten amendments to the federal constitution are limitations on the State power. If this popular error is countenanced by professional journals how can we longer condemn as shysters and sensationalists the lawyers who try to get the Supreme Court of the United States to revise every judgment of State courts in criminal cases? Surely the United States Supreme Court has gone far enough of its own motion in releasing criminals from trials or sentences in State courts for crimes which the federal courts themselves cannot take cognizance of, without being induced to extend any further the scope of its writ of *habeas corpus*.

Iowa City, Iowa. EMLIN MCCLAIN.

JETSAM AND FLOTSAM.

A BARBAROUS JURY CUSTOM. — Altered circumstances, resulting from the march of progress and the development of civilization, should result in appropriate changes of legislation. Only in the matter of the administration of the law do we stand still. We have given up the barbarous practice of subjecting jurors, while deliberating, to hunger and thirst, and cold; why not give up that other relic of barbarism, the senseless rule of unanimity?

The propriety of the rule of unanimity has been a subject of grave doubt for more than a century. Emlyn, as early as 1730, in his preface to the second edition of Howell's "State Trials," makes an eloquent appeal for the abolition of the rule. Hallam, in the supplemental notes to his "Middle Ages," designates it a "preposterous relic of barbarism." The English common law commissioners of 1831 condemn the rule in very positive language, and propose that the jury shall not be kept in deliberation longer than twelve hours, unless at the end of that period they unanimously agree to apply for further time; and that at the expiration of twelve hours, or of such prolonged time for deliberation, if nine of them concur in a verdict, it shall be taken. Dr. Francis Lieber, in his "Civil Liberty and Self-Government," and more particularly in an article in the *American Law Register* for 1867, is outspoken in his condemnation of the practice of requiring unanimous verdicts. Bentham, in his "Essay on the Art of Packing Juries," says it could not have been the work of calm reflection, working by the light of experience, and calls it "no less extraordinary than barbarous." Judge Cooley, in his edition of Blackstone, characterizes it as "repugnant to all experience of human conduct, passions and understandings," and further says that "it could hardly in any age have been introduced into practice by a deliberate act of the legislature." Ex-Governor Koerner, of Illinois, calls it "the illogical unanimity system, which has become a great source of corrup-

tion and consequent denial of justice." In 1876, Governor Carpenter, of Iowa, in a message to the legislature of that State, called it "an antique absurdity which has too long fettered the administration of justice." In the same year, a committee of the Wisconsin legislature reported in *favor* of submitting to the people of that State a constitutional amendment empowering a less number than twelve to return a verdict. These few selected from innumerable similar expressions, will suffice to give an idea of the development and strength of the opposition to the iron rule of unanimity. — *Sigmund Zeisler in the May Forum.*

ADMISSION OF GROVER CLEVELAND TO THE BAR OF THE UNITED STATES SUPREME COURT.—All citizens are equal before the law. It is but a short time since that citizen Cleveland, as President of the United States, selected and nominated citizen Melville W. Fuller, of Chicago, as chief justice of the Supreme Conrt of the United States. On Thursday of this week, citizen Grover Cleveland appeared before the court of which he had appointed the chief justice, and asked for permission to practice law and be admitted to the federal bar, which was granted upon the same terms and conditions that it would have been to the humblest practitioner in any of the State courts, he first taking the same oath upon the same old Bible that hundreds before him had taken. We congratulate the ex-president upon his admission to the federal bar. There is no reason why an ex-president should not again mingle with his fellow-citizens and follow the chosen profession of his life. Why should a man, because he has been President of the United States, become a cipher and idly wait for death to take him hence? We are no prophet, but are of the opinion if a Democrat is to be the next President of the United States it will be ex-President Cleveland: if a Republican, that his name will not be Harrison, and that he will hail from Illinois, the State which gave Abraham Lincoln to the Nation.—*Chicago Legal News.*

ELECTRICITY IN ITS LEGAL AND MEDICO-LEGAL RELATIONS.—The proper regulation of electricity, in the matter of the telegraph, the telephone, electric lighting and electricity as a force in machines or motors, is a subject now pressing its claim upon public attention, due to the wonderful growth and progress of electrical invention in the last decade, or semi-decade.

All these subjects require legislation, either by municipal regulation or by State enactments based upon

1 The danger of injury to life—and

2. That of injury to property, and notably by fire.

These are now important subjects of investigation by the senate committee lately in session in the city of New York, and they are matters of profound interest to the city of New York, and other great cities, placed in the anamolous position in which the metropolis is now situated by the destruction, by the city authorities, under the panic created by the painful deaths recently occurring in our midst, of one-quarter of the mileage of wires, and seven-tenths of the arc lights so necessary under our civilization, to life in a great metropolis.

3. The question of this energy, as the agent and means of executing criminals under existing laws, and the relation of electricity to health, disease, and offenses against the laws, arrest our attention.

A committee has been named by the medico-legal society to take these subjects under consideration, and no more important field of scientific research and inquiry has ever come before the body.—*Medico-legal Journal.*

"ORIGINAL PACKAGE" DECISION OF THE UNITED STATES SUPREME COURT. — Some very grotesque comments have been made upon the supreme court's "original package" decision, but the palm must be awarded to certain "temperance workers," mentioned by the Washington correspondent of the Boston *Journal*, whose "theory seems to be that the complexion of the court was changed by electing Mr. Cleveland, who was enabled to appoint two extreme States'-rights democrats to the bench, and, but for the fact that they have seats on that bench, this decision might not have been rendered." To appreciate fully the humor of this theory, one must reflect that the States'-rights side of the pending question was that which held that each State possesses the power to regulate the liquor traffic for itself, while the federalist side was that which maintained the supremacy of congress; and that the two democratic appointees of President Cleveland, Fuller and Lamar, both took the federalist side, along with Miller, Bradley, and Blatchford of the republicans. Equally amusing is the theory of "Rising Sun Stove Polish" Morse that the people really responsible for the decision of the court are the men in this State who voted for St. John in 1884. "The third-party Prohibitionists of New York," he says, "elected Cleveland by giving him the electoral votes of that State. Cleveland appointed Chief-Justice Fuller, a democrat, and made a majority of the supreme court in favor of the liquor traffic possible. Had they helped to elect a Republican president, Republican judges would have sat upon this question and a different decision would have been reached, and the decision of the lower court would have been affirmed." If a man like Morse ever stopped to think, it would puzzle even him to give any reason for supposing that, if Mr. Blaine had been elected and had appointed two republican judges, those two republicans would have been any more likely to vote with Harlan, Gray, and Brewer than with Miller, Bradley, and Blatchford.—*The Nation.*

ETIQUETTE OF LAWYERS. — MAX O'RELL probed a very sore spot in American manners, says the St. Louis *Republic*, when he ridiculed the conduct of the average lawyer in court. Drop in any day in one of those cheerless rooms where the legal grist is ground by St. Louis' circuit court judges and watch the attitude of the legal luminaries when they address the court. Earnestness is written on their features, and their remarks to the learned judges are couched in respectful language. But, shade of Chesterfield! Is their eloquence made more impressive ignoring all the dogmas of Delsarte? Is an argument better clinched by plunging the hands deep in the trousers' pockets, or a sentence more happily punctuated by vigorous expectoration when a period is reached? This is a great and democratic country, and ample pockets and formidable cuspidors must and shall be preserved; but surely the most determined democrat can be dignified and decent without forfeiting his claim to independence.—*Washington Star.*

RECENT PUBLICATIONS.

THE AMERICAN STATE REPORTS, Containing the Cases of General Value and Authority, Subsequent to Those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States, Selected, Reported, and Annotated By A. C. Freeman and the Associate Editors of the "American Decisions." Vol. 11. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1890.

There are many important cases reported in this volume and quite a number of interesting annotations notably that appended to Bedell v. Herring, 77 Cal. 572, on the subject of signing a promissory note without knowing its contents and the effect thereof upon a *bona fide* purchaser for value.

THE MODERN LAW OF CARRIERS or the Limitation of the Common Law Liability of Common Carriers under The Law Merchant, Statutes and Special Contracts. By Everett P. Wheeler of the New York Bar. New York: Baker, Voorhis & Co., Law Publishers, 66 Nassau St. 1890.

We are glad to see law books written by active practitioners and we only regret that such efforts are rare. There ought to be and there undoubtedly is, something in the familiarity with the actual practice of the law which better qualifies a man to write that which is of value to other practitioners, and though some of our best books were written by men whose experience in practice was limited, there is nothing to show that they would not have been better, had the authors the benefit of a practical experience. This book is by a gentleman of high standing and large experience at the New York bar. His business has been in the line of what he writes and we can see all through its pages evidence of a practical and thorough knowledge of the subject. This is observable in the business-like arrangement of his topics and the manner of their treatment. The book is not, as might be supposed from its title, a complete book on carriers. It treats simply of the limitations upon the liability of common carriers placed there by the law merchant or by special contract. It treats of the limitations upon the liability of carriers of passengers as well as of goods. It has substantially the same scope as Mr. Lawson's work on the "Contracts of Common Carriers" written some years ago.

The work is thorough and accurate and the style of the author is especially pleasing.

We take pleasure in commending the printing and binding. The type used is something new in book work and the readers of this book will agree with us that it is unexcelled in clearness and appearance.

A COMMENTARY ON THE LAW OF DIVORCE AND ALIMONY. By Wm. Hardcastle Browne, Esq., of the Philadelphia Bar. Author of a Law Digest on Statutes, Decisions and Cases on Divorce and Alimony. Philadelphia: Kay & Brother, Law Booksellers, Publishers and Importers. 1890.

A book on a subject largely statutory in character is in general as unsatisfactory as it is difficult to prepare. Mr. Browne, however, seems to have accomplished the task with good success, and has here given us a book of 460 pages, which though perhaps not so philosophic as that of Bishop contains the law pertaining to divorce and the different causes therefor, the procedure in obtaining divorces, alimony and the custody of children concisely stated with an exhaustive review of the authorities and the statutes of the different States. It will doubtless be found of good, practical value. The publisher has introduced an innovation in the shape of the omission of numbered sections. We think it a mistake as the searcher is obliged to hunt through the chapters for what he wants, unless he turns to the index and gets the page. We also think that the index might have been fuller. It is simply a word index which at the best is unsatisfactory.

A TREATISE ON PLEADING AND PRACTICE IN EQUITY in The Courts of the United States, with chapters on Jurisdiction of the Federal Courts, Practice at Common Law, Removal of Causes from State to Federal Courts, and Writs of Errors and Appeals. With special reference to patent causes and the foreclosure of railway mortgage. By Roger Foster of the New York Bar. Author of "Foster's Federal Judiciary Act," and "Trial by Newspaper" and Lecturer on Federal Jurisprudence at the Law School of Yale University. Boston: The Boston Book Company. 1890.

The chief value of this work lies in the fact that there is no other on the subject. There are books which embrace portions of this, but there is no other work which pretends to give in detail and in full the procedure and practice in the federal courts.

The style of the book is good and its citation of authorities ample. We have no doubt that federal court practitioners will find it a valuable guide. It contains 800 pages well printed and well indexed and contains forms for use in federal courts, recent important statutes, rules of practice in equity and the rules of the Supreme Court of the United States.

BOOKS RECEIVED.

THE TRANSFER OF NEGOTIABLE PAPER as Collateral Security. Being the Sharswood Prize Essay of the University of Pennsylvania for the year 1886 and the Johnson Prize Essay for the same year. By Lewis Lawrence Smith, of the Philadelphia Bar. Philadelphia: T. & J. W. Johnson. 1889.

HUMORS OF THE LAW.

A YOUNG thief who was charged the other day with picking pockets, demurred to the indictment, "for that, whereas he had never picked pockets, but had always taken them just as they came."

WHEN men are condemned to be executed, for some time previous to the fatal day they seem to be given to sportiveness.

However, there is one pastime in which they are not permitted to indulge, and that is skipping the rope.

"So you were not satisfied to eat a dinner at the man's restaurant without paying for it, but you went off with the caster and the spoons besides?"

"That's so, your Honor; but I took the caster and the spoons from honest motives."

"Honest motives?"

"Yes, I wanted to pawn them, so I could raise money to pay for the dinner."—*The Green Bag.*

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ABATEMENT—Joint Tort-feasors.—An action against one of two joint tort-feasors cannot be pleaded in abatement to an action against the other joint tort-feasor for the same tort, as the defendants are not the same in both actions.—*State v. Boyce*, Md., 19 Atl. Rep. 368.

2. ACKNOWLEDGMENT OF DEEDS.—In Kentucky, where only the county clerk and his deputies are authorized to take acknowledgments of deeds, the clerk may take the acknowledgment of a deed in which he is grantee.—*Stevenson v. Brasher*, Ky., 13 S. W. Rep. 242.

3. ADMINISTRATORS—Execution. — A return of "No property to be found" on an execution against a certain person individually, issued on a judgment recovered against him as administrator, is no evidence of a *devastavit*, as to him in that capacity.—*Forrester v. Tift*, Ga., 10 S. E. Rep. 1015.

4. ADMINISTRATORS — Sale of Perishable Property. — Though a court of ordinary has exclusive original jurisdiction to order an administrator to sell the perishable property of his intestate's estate, yet, where it has no power to revoke such order except in term, a court of equity will enjoin a sale of such property ordered to take place in vacation, where sufficient thereof has not been set apart for a twelve months' support of the intestate's minor children, to which they are entitled under Code Ga. § 2571.—*Simmons v. Crumbley*, Ga., 10 S. E. Rep. 1090.

5. ADMINISTRATION—Probate.—Under Code Wash. T. § 1341, providing that where one dies outside of the territory, owning property in it, the probate court of the county to which application is first made for letters of administration shall have exclusive jurisdiction of the settlement of the estate, a decree of the probate court vesting property in the territory for the support of public schools, as provided by § 3302, subd. 8, because its owner died without kindred or husband or wife, is void, where the court of another county has already granted letters of administration of the estate. — *Territory v. Klee*, Wash., 23 Pac. Rep. 417.

6. ADVERSE POSSESSION.—From the time a person obtains a patent from the State, the statute of limitations will run in favor of one in possession, and claiming adversely, against the patentee, and all claiming under him.—*Wilhoit v. Tubbs*, Cal., 23 Pac. Rep. 386.

7. APPEALS—Appealable Orders. — An order denying defendant's motion for judgment in his favor on a special verdict is not appealable, as it is neither an order determining the action, and preventing a judgment from which an appeal might be taken, nor one involving the merits of the action, from which orders appeals are allowed by Rev. St. Wis. § 3069, subds. 1, 4.—*Treat v. Hiles*, Wis., 44 N. W. Rep. 1088.

8. APPELLATE JURISDICTION — Freehold. — A suit in which the only question in issue is whether, under a lease of a right of way, the lessee has the right to enter the lessor's premises at a particular point, does not involve a freehold, within the meaning of the Illinois statute regulating appeals.—*Keating v. Hayden*, Ill., 23 N. E. Rep. 1023.

9. ASSESSMENT—Benefits. - Under Rev. St. Ill. ch. 24, art. 9, § 24, which provides that property benefited by a proposed local improvement may be specially assessed, up to the amount it will be "actually benefited," it is erroneous, in assessing the benefits to be caused by opening a street which will cross a navigable stream to include in the estimates the benefits that would accrue to such property from the erection of a bridge across such stream, when the ordinance for opening the street makes no provision for such a bridge. — *Hutt v. City of Chicago*, Ill., 23 N. E. Rep. 1011.

10. ASSIGNMENT FOR BENEFIT OF CREDITORS. —Under Rev. St. Ill. 1889, ch. 10a, regulating assignments for the benefit of creditors, and giving the county courts jurisdiction thereof, a sheriff cannot levy on property so assigned under a writ from another court after the jurisdiction of the county court has attached, since the property, in such case, is in the custody of the court.—*Wilson v. Aaron*, Ill., 23 N. E. Rep. 1037.

11. ASSIGNMENT FOR BENEFIT OF CREDITORS — Preferences.—An assignment for benefit of creditors, made by the members of a private banking firm in Virginia, and conveying all their individual and firm property for both individual and firm debts, will not be held fraudulent on its face because it appropriates partnership assets to pay individual debts in preference to partnership debts, where the State court has decided that such deeds should be construed distributively, and the partnership assets should be applied to partnership debts, and individual assets to individual debts; and also where both the assets and the debts were so mixed that it was impossible, at the time of the assignment, to distinguish between them.—*Peters v. Bain*, U. S. S. C., 10 S. C. Rep. 354.

12. ASSIGNMENT FOR BENEFIT OF CREDITORS. — A promise made by a debtor, to induce one of his creditors to accept a statutory assignment made by him, that he would pay the balance of such creditor's claim remaining after the distribution of the assigned estate, is fraudulent and void, as being a secret agreement by which a preference is given by an assignor to one of his creditors.—*Dansby v. Freiberg*, Tex., 13 S. W. Rep. 331.

13. ATTACHMENT— Collateral Security. — A creditor holding collateral security for his debt, upon property belonging to the debtor, can maintain an attachment against the same and other property of the debtor. — *William Deering & Co v. Warren*, S. Dak., 44 N. W. Rep. 1068.

14. BAIL—Subsequent Arrest. — Where defendant has been released on bail, his subsequent arrest for another offense does not operate, *ipso facto*, to discharge the sureties on the bond. — *Tedford v. State*, Miss., 7 South. Rep. 851.

15. BAILMENT—Corporate Stock.— Plaintiff and others bought shares of stock which were included in a certificate standing in the name of E. Each purchaser paid his share of the purchase to defendants, who paid it over to E, and received the certificate from him. Defendants then signed a paper, stating that they had received from plaintiff the number of shares bought by him, and agreeing "to forward the same to W [the office of the company], for the purpose of transfer, and to deliver new certificate to him [plaintiff] as soon as received:" *Held*, that the receipt showed a bailment to, and not a sale by, defendants. — *Coquard v. Werner*, Mo., 13 S. W. Rep. 341.

16. BANKS AND BANKING—Taxation.—Plaintiff received for deposit checks and drafts on other city banks, which were sent by it to another bank to be put through the clearing-house, necessitating the keeping of a large balance in such other bank to meet any balances that might be due from plaintiff to such bank on account of those clearances: *Held*, that the checks and drafts upon other city banks constituted a part of plaintiff's deposits subject to payment on check or draft, and should be included in determining the average daily deposits for the purpose of taxation under Rev. St. U. S. § 3408.—*Bank of the Metropolis v. Weber*, U. S. C. C. (N. Y.), 41 Fed. Rep. 413.

17. BANKS AND BANKING—Pass Book.— Question as to liability of bank in paying amount of plaintiff's deposit to one who had stolen the pass book and presented it to the bank personating plaintiff. — *Wegner v. Second Ward Sav. Bank*, Wis., 44 N. W. Rep. 1096.

18. BANKS AND BANKING—Note.— Where a bank, holding a note for collection, sends it to the bank where it is payable, the latter becomes the payee's agent; and demand of payment and notice of dishonor by its cashier, who is a notary public, will bind the indorsers. —*Blakeslee v. Hewitt*, Wis., 44 N. W. Rep. 1105.

19. BANKS AND BANKING—Drafts.—Complainant sent a sight-draft to a bank in New York, drawn on a debtor in Boston. In the accompanying deposit ticket, it was named under the head of "checks," but it was credited on the bank's books as if it were a deposit of money. Before it was collected the bank closed its doors. During its five years of business with the bank, complainant had never drawn against out of town paper before it was actually collected; and, although complainant was allowed interest on its daily balance, it appeared that the bank reserved the right to charge exchange and interest for the average time taken in collection on such paper: *Held*, that the bank did not become owner of the draft. — *St. Louis, etc. Ry. Co. v. Johnston*, U. S. S. C., 10 S. C. Rep. 890.

20. BANK CHECKS — Payment. — Possession by a bank of an unindorsed check drawn on it in favor of complainant or his order, coupled with evidence that it was not its custom to require a payee to indorse the check when paid to him in person, is not sufficient to show payment to him, when denied by him.—*Pickle v. People's Nat. Bank*, Tenn., 12 S. W. Rep. 919.

21. BONDS—Sureties.—In an action against the sureties on a bond conditioned that the principal should promptly account for, and pay over and apply, all sums of money received for plaintiff, plaintiff need not show that before bringing suit there had been a settlement of accounts between it and the principal, and the balance due plaintiff ascertained. — *German Ins. Co. v. Smead*, Ark., 13 S. W. Rep. 332.

22. CARRIERS—Goods in Transit.—When property is in the hands of a carrier for transportation, and, in the course of transit, is seized upon legal process sued out against the owner of the property, and taken out of the carrier's possession, such property is placed in the custody of the law, and is so placed by a superior power, the power of the State, and excuses the carrier from liability for not delivering the goods. — *Jewett v. Olsen*, Oreg., 23 Pac. Rep. 262.

23. CARRIERS—Delivery to Warehousman. — Where a common carrier is accustomed to deliver goods transported to it by a warehouseman, who is independent of the carrier, and by whom the consignees are notified of the arrival of such goods, and the consignees are aware of the custom, and have long acquiesced in it, the liability of the carrier, ends with the delivery of the goods to the warehouseman, and no recovery can be had against the carrier for their subsequent destruction by fire.—*Black v. Ashley*, Mich., 44 N. W. Rep. 1120.

24. CARRIERS—Discrimination.—Where a railway company incorporated under the laws of this State misuses a franchise, privilege, or right conferred upon it, or claims the right to exercise, or has exercised, "a franchise, privilege or right in contravention of law," this court has jurisdiction to inquire into and correct the mischief, though the corporation may be engaged in interstate commerce, and the misuser or usurpation to be corrected relate to and concern that traffic.— *State v. Cincinnati, etc. Ry. Co.*, Ohio, 23 N. E. Rep. 928.

25. CARRIERS OF PASSENGERS—Negligence.—A railroad company, in constructing a platform for the use of passengers in getting on and off trains at a station, impliedly represents to the public that the platform is reasonably safe and sufficient for such purpose, and it is its duty to make it so that it may be safely used in approaching and leaving trains in any way in which passengers might reasonably, and with reasonable care be expected to approach and leave them.—*Pennsylvania Co. v. Marion*, Ind., 23 N. E. Rep. 973.

26. CARRIERS—Passengers—Negligence.— In an action against a railroad company for injuries sustained by a passenger, the train being thrown from the track owing to a broken rail, it was error to permit plaintiff to introduce in evidence pieces of the broken rail, picked up after they had been exposed to the weather for six months after the accident, and to permit the jurors to draw a conclusion as to the soundness or unsoundness of the rail therefrom. — *Stewart v. Everets*, Wis., 44 N. W. Rep. 1092.

27. CHATTEL MORTGAGES—Res Adjudicata. —The facts that mortgage creditors brought replevin for mortgaged chattels which had been taken under execution, and that judgment was rendered against them under Code Miss. § 2633, which forbids such an action in such case, and provides a remedy by claimant's issue, does not preclude them from thereafter maintaining a bill to foreclose.—*Conn v. Bernheimer*, Miss., 7 South. Rep. 345.

28. CONSTITUTIONAL LAW — Legislative Powers. — Act Wash. Ter. Feb. 2, 1888, entitled an act "for the incorporation of towns and villages," which provides in § 1, that a majority of the taxable inhabitants of any town or village may present a petition to the district judge setting forth the area desired to be included in such village, and praying to be incorporated, and that thereupon the judge shall make an order declaring such town or village duly incorporated, and designating its metes and bounds, is invalid, being a delegation of legislative functions to a judicial court. — *Territory v. Stewart*, Wash., 23 Pac. Rep. 405.

29. CONSTITUTIONAL LAW — Taxation. — Under Const. Ark. 1874, art. 16, § 5, providing that the value of property assessed for taxation shall be ascertained in such manner as the general assembly shall direct, but shall be equal and uniform throughout the State, a statute is not unconstitutional on the ground that it employs a different instrumentality for the assessment of railroad property from that employed to assess other property. —*St. Louis, etc. R. Co. v. Worthen*, Ark., 13 S. W. Rep. 254.

30. CONSTITUTIONAL LAW—Interstate Commerce.—Act Miss. March 3, 1888, providing that "all railroads carrying passengers in this State, other than street railroads, shall provide equal, but separate, accommodation for the white and colored races, by providing two or more passenger-cars for each passenger train, or by

dividing the passenger-cars by a partition so as to secure separate accommodations," since it operates only on the earnings of passengers from one point to another within the State, is not an interference with interstate commerce. — *Louisville, etc. Ry. Co. v. State of Mississippi* U. S. S. C., 10 S. C. Rep. 348.

31. CONSTITUTIONAL LAW — Local and Special Laws. — The act entitled "An act to require the county commissioners in any county having a population, at the census of 1880, of 43,788, and containing a city of the second class, third grade, to provide a depositary for the county funds, and for other purposes" (86 Ohio Laws, 70), is a law of a general nature, applicable only to Summit county (there being no other county having the specified population and containing a city of the designated class and grade), and is in conflict with § 26 of art. 2, of the constitution of this State, which requires that "all laws of a general nature shall have a uniform operation throughout the State." — *State v. Elliot*, Ohio, 23 N. E. Rep. 931.

32. CONSTITUTIONAL LAW—Schools. — Act. Miss. March 7, 1888, which provides for the election of county superintendents of education in part only of the counties of the State, does not thereby conflict with Const. Miss. art. 8, § 1, requiring "a uniform system of free public schools."—*Wynn v. State*, Miss., 7 South. Rep. 353.

33. CONTRACTS—Restraint of Trade.—A contract to sell a brand of cigars to no one in the State but defendant, and to give him the exclusive agency for such sale, is not in restraint of trade.— *Newell v. Meyendorff* Mont., 23 Pac. Rep. 333.

34. CONTRACT—Cancellation.— Where a railroad company has built its road on a right of way granted to it in reliance on its contract to erect machine shops and a round house in a certain town, and to build its road to a certain point, the deed for the right of way will not be canceled, though the company has failed to perform its contract, since the parties cannot be placed *in statu quo*. —*Buckner v. Pac., etc. Ry. Co.*, Ark., 13 S.W. Rep. 352.

35. CORPORATIONS—Churches—Stockholders. — Stockholders in an incorporated institution of learning under control of a church conference, who have accepted the plan of a board of education appointed by the conference, by contracting with it, cannot object to the validity of an act incorporating such board of education for the purpose of carrying out its plan.— *Bryan v. Board of Education*, Ky., 13 S. W. Rep. 276.

36. CORPORATE POWERS—Mortgage. — The execution by a trading corporation of a mortgage of its property as security for money borrowed in the prosecution of its business is not *ultra vires*. The power exists by implication, in the absence of charter limitations. — *Wood v. Meyer*, Miss , 7 South. Rep. 389.

37. COUNTIES—Employment of Attorney.— A contract by a board of county commissioners, engaging a county attorney for three years, made at a time when the board had an attorney employed whose term had three months to run, and entered into with the admitted intention of binding the boards to be thereafter organized, is contrary to public policy, and void. — *Board of Commissioners v. Taylor*, Ind., 28 N. E. Rep. 782.

38. COUNTIES—Indebtedness.— In an action against a county on warrants given in satisfaction of a judgment, an answer which alleges that at the time the judgment was rendered the county debt exceeded the constitutional limit, without stating that such debt exceeded the limit at the time of making the contract on which the judgment was rendered, is demurrable.— *Wilder v. Board of County Com'rs*, U. S. C. C. (Colo.), 41 Fed. Rep. 512.

39. COVENANTS OF TITLE—Breach. — A grantee who is threatened with an action of ejectment may surrender possession and sue his grantor for breach of covenant without waiting to be evicted, but he assumes the risk of showing that the person to whom he surrendered possession had the paramount title. — *Lambert v. Estes*, Mo., 13 S. W. Rep. 284.

40. CRIMINAL EVIDENCE — Murder. — Where the evidence is circumstantial, but of such a character as to preclude every hypothesis inconsistent with the guilt of the accused, the verdict will not be set aside as being against the evidence.— *Coleman v. State*, Fla., 7 South. Rep. 867.

41. CRIMINAL EVIDENCE—Confessions. — A request to charge that, if the jury have any reasonable doubt as to whether or not certain confessions were voluntary, they must reject them is properly refused; and a charge in lieu thereof, leaving it to the jury to decide whether, from all the evidence, the confessions were voluntary, is correct.— *Thomas v. State*, Ga., 10 S. E, Rep. 1015.

42. CRIMINAL LAW— Former Conviction. — A plea of former conviction to an indictment for disturbing religious worship is not sustained by showing a former conviction for intoxication and profanity indulged in on the same occasion, when the evidence shows that defendant was guilty of disturbing religious worship by other modes than by being drunk and profane, as there is a want of identity of the two charges. — *Ball v. State*, Miss., 7 South. Rep. 358.

43. CRIMINAL LAW— Adultery. — On the trial of an indictment for adultery, the court charged the jury: "The fact that a married man makes frequent visits in the day-time, and sometimes at night, to the house of a woman of known bad reputation, without any legitimate business, is a fact tending to show an adulterous connection between them:" *Held*, that the charge was erroneous, in denying to the jury the right to draw this inference.—*Hall v. State*, Ala., 7 South. Rep. 340.

44. CRIMINAL LAW— Conspiracy. — Evidence sufficient to justify finding of conspiracy to commit an unlawful act in which murder was committed. — *Holtz v. State*, Wis., 44 N. W. Rep. 1107.

45. CRIMINAL LAW — Arson. — An information which charges, in the language of Pen. Code Cal. § 447, defining arson, that defendant did wilfully and maliciously burn "a building" with intent to destroy it, is sufficient, without describing the building, according to the definition of § 448, as one capable of affording shelter to human beings, or appurtenant thereto, or connected with an erection so adapted." — *People v. Russel*, Cal., 23 Pac. Rep. 418.

46. CRIMINAL LAW—Bigamy. — Under Code Ga. § 4530, defining bigamy as "knowingly having a plurality of husbands or wives at the same time," the second marriage contract constitutes the crime; and cohabitation by defendant with the second wife need not be shown. —*Nelms v. State*, Ga., 10 S. E. Rep. 1067.

47. CRIMINAL LAW— Shooting. —To shoot at another without legal excuse, with a pistol loaded with powder only, within the distance to which the pistol will carry when so shot, will constitute the offense of shooting at another.[29] But as to what is such distance is matter of fact for determination by the jury, and not a question of law to be decided by the court.—*Clark v. State*, Ga., 10 S. E. Rep. 1094.

48. CRIMINAL LAW — Excessive Penalty.— Pen. Code Cal. § 1205, which provides that a judgment that defendant "pay a fine" may also direct that he be imprisoned until the fine be satisfied, does not apply to those cases in which the court has imposed a term of imprisonment and also a fine, but it applies only to those cases in which the fine stands alone as a punishment. People v. Righetti, 4 Pac. Rep. 1185, overruled.—*In re Rosenheim*, Cal., 23 Pac. Rep. 872.

49. CRIMINAL PRACTICE — Perjury — Indictment. — An indictment which contains every allegation mentioned, in the form given in the appendix to the Criminal Code for such crime, is sufficient.— *State v. Ah Lee*, Oreg., 23 Pac. Rep. 424.

50. CRIMINAL PRACTICE—Change of Venue.— An application for change of venue was supported by defendant's affidavits showing such excitement and prejudice against him, several months before the trial, as would have entitled him to a change. The affidavits of

seven reputable witnesses testified that this excitement and prejudice continued to the time of the trial, and infected the proceedings, but this was rebutted by the affidavits of sixty-five reputable witnesses, who had apparently better opportunities for knowing, which affirmed that the prejudice did not then exist, and that defendant could have a fair trial: *Held*, that it was not error to overrule the application, without examining witnesses *ore tenus* on the issue presented.—*Hawes v. State*, Ala., 7 South. Rep. 302.

51. DEATH BY WRONGFUL ACT—Evidence.—In an action under Rev. St. Tex. art. 2899, subd. 1, authorizing an action for death caused by the negligence of the proprietor of a railroad, or by the gross negligence of his servants, charges authorizing a recovery on the ground of ordinary negligence of defendant's servants, and a refusal to charge that gross negligence must be shown, are erroneous.—*Galveston, etc. Ry. Co. v. Kutac*, Tex., 13 S. W. Rep. 327.

52. DEATH BY WRONGFUL ACT— Negligence.— Where contributory negligence is pleaded as a defense, it is proper to instruct the jury that, if plaintiff proves to their satisfaction that the death was caused by defendant's negligence, then the burden of proof is on defendant to establish the existence of contributory negligence.—*San Antonio, etc. Ry. Co. v. Bennett*, Tex., 13 S. W. Rep. 319.

53. DECEIT—Damages. — In an action for false representation, whereby plaintiff was induced to buy land, an instruction that the measure of damages is the difference between the fair cash value of the land as it actually was at the time of the conveyance, and its fair cash value at that time had it been as represented, is erroneous, as the correct measure of damages in such case is the difference between the fair cash value of the land and the price paid.—*Atwater v. Whiteman*, U. S. C. C. (Minn.), 41 Fed. Rep. 427.

54. DECEIT—Sale. — A count in a declaration which alleges that the defendant, in order to induce the plaintiffs to sell him goods on credit, falsely and fraudulently represented that he intended to pay therefor, does not state a sufficient cause of action for deceit.—*Kitson v. People*, Ill., 23 N. E. Rep. 1024.

55. DEEDS—Record.—After land had been conveyed to plaintiff, but before the deed was recorded, a mortgagee of the property foreclosed his mortgage, became the purchaser at the sale recorded the referee's deed, and conveyed the property for a valuable consideration to defendant: *Held*, that defendant was entitled to protection against the conveyance to plaintiff, without regard to the question whether his grantor had or had not notice thereof.—*Slattery v. Schwannecke*, N. Y., 23 N. E. Rep. 922.

56. DEED—Power of Sale.—*Held*, that the deed conferred on the daughter a power of sale which enabled her to convey a fee-simple title.—*Fritsch v. Klausing*, Ky., 13 S. W. Rep. 241.

57. DIVORCE—Alimony.—Though, in a technical sense, there can be no alimony where the relation of husband and wife has ceased to exist, yet Civil Code Cal. § 4, requires Code to be liberally construed, with a view to effect its object and to promote justice, a permanent future allowance to a divorced wife will not be defeated because granted under the misnomer of "permanent alimony," where it is a lawful grant under Civil Code, § 139.—*In re Spencer*, Cal., 23 Pac. Rep 395.

58. DIVORCE—Judgment.—A judgment of divorce, entered in the minutes, takes effect from its rendition, and may be entered *nunc pro tunc*, after plaintiff's death, on motion of her second husband, whether the failure to enter it before was due to plaintiff's own neglect, or to that of her attorneys, or of the clerk of the court.—*In re Cook's Estate*, Cal., 23 Pac. Rep. 392.

59. DIVORCE—Pleading.—Under Gen. St. Ky. 728, providing that "no petition for divorce shall be taken for confessed, or be sustained by the admissions of the defendant alone, but must be supported by other proof," an answer in a suit for alimony, which avers that plaintiff's former husband is still alive, and that she is not, therefore, the wife of defendant, and which asks that the contract of marriage be annulled, cannot be taken as true by the fact that it is not put in issue by a reply or otherwise.—*Freeman v. Freeman*, Ky., 13 S. W. Rep. 246.

60. ELECTION—Expenses.—A legislative act appropriating a certain sum "for the the purpose of paying the expenses of the various counties in this State of the special election," does not create a fund applicable to the payment of a demand for publishing proposed amendments to the State constitution to be voted upon at such special election.—*Bragg v. State*, Nev., 23 Pac. Rep. 427.

61. EMINENT DOMAIN—House Erected on Another's Land.—In proceedings to condemn land for school purposes, it appeared that the school-district purchased the "squatter" title of the parties in possession, paying the full value of the land, relying on the erroneous advice of reputable counsel that this title was superior to that of the parties claiming under a patent, that it took possession and erected school buildings thereon, though notified by the parties claiming under the patent that it would do so at its peril; that the premises were necessary for school purposes and were taken for that public use: *Held*, that just compensation did not include compensation for the improvements. — *Searl v. School-Dist.*, U. S. S. C.; 10 S. C. Rep. 374.

62. EQUITY—Lost Bond.—Where a city bond payable to bearer is lost the owner may, on given indemnity security, obtain judgment against the city, in equity, for the amount of the bond and interest.—*City of Bloomington v. Smith*, Ind., 23 N. E. Rep. 972.

63. EQUITY—Parol Promise to Make Devise.—A parol promise to devise all one's property to a child, made to the child's father in consideration of his allowing the promisor to adopt the child, being void under the statute of fraud, is not enforceable in equity, though the child lived with the promisor as his daughter till her marriage but never had possession of the property. —*Pond v. Sheean*, Ill., 23 N. E. Rep. 1018.

64. EQUITY—Administrators.—A bill by heirs of a decedent praying that an order allowing a final account of his administrator, and an order discharging the latter, be vacated, and that the administrator be required to account, which is based on his alleged fraudulent management of the estate, is sufficient to require an answer by the administrator.—*Grady v. Hughes*, Mich., 44 N. W. Rep. 1050.

65. EQUITY—Decree to Convey Land.—In ejectment it appeared that defendants' grantor had purchased the land in dispute at an execution sale against plaintiff's grantor; that prior to such sale plaintiff's grantor had executed a trust-deed, conveying the property for the use and benefit of his wife. Defendants' grantor brought suit in equity to set aside the trust-deed, and obtained a decree declaring the deed null and void, and vesting all the right, title and interest in the property in himself: *Held*, that under Rev. St. Mo. 1879, § 3692, such decree was sufficient to pass the title to the property to defendants' grantor.—*Macklin v. Aellenberg*, Mo., 13 S. W. Rep. 350.

66. EVIDENCE—Res Adjudicata.—On trial of action for the recovery of personal property, the record of an action between the defendant and a third person for the same property, in which action the present plaintiff testified that the property, belonged to such third person, is admissible in evidence in defense. —*Jones v. Dipert*, Ind., 23 N. E. Rep. 944.

67. EVIDECE—Res Gestæ.—In an action for personal injuries, expressions of pain made by plaintiff more than four year after receiving the injuries, and after the action was commenced are inadmissible in evidence.—*Laughlin v. Street Ry. Co.*, Mich. 44 N. W. Rep. 1049.

68. EXECUTION BOND—Sheriff.— In Georgia, a forthcoming bond given by a claimant of property taken under execution against another person, and which is accepted by the sheriff, does not cease to have effect on

the withdrawal of the claim, but continues in force throughout the whole litigation, whether a second claim is filed or not; and the sheriff has no right, after the withdrawal of the claim to retake the property in the hands of the claimant, and charge the expense of keeping it to the execution plaintiff but his remedy is by action on the bond, on the claimant's failure to produce the property.—*Houser v. Williams*, Ga., 11 S. E. Rep. 129.

69. EXECUTORS AND ADMINISTRATORS.—Under Code Wash. T. § 1472, providing that when a claim against a decedent's is rejected by the executor, administrator, or probate judge, the holder must sue the executor or administrator within three months after its rejection, no appeal lies from an order of the propate court rejecting a claim.—*Walkins v. Walkins*, Wash., 23 Pac. Rep. 411.

70. EXECUTORS AND ADMINISTRATORS—Accounting.—Though there is no evidence that the executors derived any benefit from the use of money belonging to the estate, they are chargeable with legal interest, with annual rests, after a year from the time of their appointment, where it appears that the administration might have been closed within that time, and the only excuse offered for the delay was the negligence of the executor's attorney.—*In re Hilliard's Estate*, Cal., 23 Pac. Rep. 393.

71. EXTRADITION—Arrest.— A defendant brought to a State on a requisition is entitled to a reasonable time and opportunity to return to the State where he was taken from before he can be arrested in a civil action.—*Molctor v. Sinned*, Wis., 44 N. W. Rep. 1099.

72. FEDERAL COURTS — Suits Against Counties.— The counties of Nevada being made liable to suit as individuals by Const. Nev. art. 8, § 5, the jurisdiction of the circuit court, in suits against such counties, which are municipal corporations, by citizens of another State, is not affected by the eleventh amendment of the constitution of the United States, which only limits such jurisdiction as to cases in which a State is a party defendant. — *Lincoln County v. Luning*, U. S. S. C., 10 S. C. Rep. 363.

73. FEDERAL COURTS—Process. — Code Va. 1887, § 3225, provides that, in an action against a railroad corporation, process may be served on any agent of the corporation when certain officers cannot be found in the county where the action is brought. In an action begun in the federal court, the sheriff's return showed that the writ was served on defendant's station agent, and did not state that none of the said officers could be found in the judicial district: *Held*, insufficient, since in the federal courts the statutory limitation applies to the district, instead of the county. — *Miller's Admr. v. Norfolk, etc. R. Co.*, U. S. C. C. (Va.), 41 Fed. Rep. 431.

74. FEDERAL COURTS—Judgment.— The federal circuit court has power to grant a temporary stay of execution of its judgments.—*Eaton v. Cleveland, etc. Ry. Co.*, U. S. C. C. (Mo.), 41 Fed. Rep. 421.

75. FEDERAL COURTS — Probate Jurisdiction. — By virtue of their chancery jurisdiction, the federal circuit courts have jurisdiction over the administration of estates when the requisite citizenship and other conditions exist. This jurisdiction does not extend to the appointment of administrators, confirmation of executors, or the probate of wills; nor will it be exercised when the State courts of concurrent jurisdiction has taken possession of the subject-matter of the controversy.—*Ball v. Tompkins*, U. S. C. C. (Mich.), 11 Fed. Rep. 486.

76. FEDERAL COURTS—Jurisdiction.—Under Rev. St. U. S. § 563, subd. 4, which gives the district courts jurisdiction of "all suits at common law brought by the United States, or by any officer thereof, authorized by a law to sue," the district court has jurisdiction of an action to enforce the liability of a stockholder in an insolvent national bank, brought by the receiver appointed for the bank by the comptroller of the currency.— *Stephens v. Bernays*, U. S. D. C. (Mo.), 41 Fed. Rep. 401.

77. FRAUDS—Statute of—Memorandum. —An order for goods, signed in duplicate by the purchaser on blanks furnished by the seller, specifying in detail what was purchased, by whom, of whom, and on what terms, together with a letter from the seller acknowledging receipt of the order, and promising to ship the goods immediately, constitute a sufficient written memorandum of a contract of sale, within the statute.—*Wilkinson v. Taylor Manuf'g. Co.*, Miss., 7 South. Rep. 356.

78. FRAUDULENT CONVEYANCES. — The fact that a debtor was induced to accept a chattel mortgage to secure a past-due debt by an offer to furnish him other goods, also to be included in the mortgage, does not justify the supreme court in setting aside a finding by the trial judge, acting as a jury, in a contest between creditors for the proceeds of the debtor's property, that the mortgage was not given with the intention to hinder and delay other creditors; both the debtor and mortgagees having testified that the mortgage was executed in good faith. — *Rouse v. Frank*, Ga., 11 S. E. Rep. 147.

79. GIFT BY STATE. — Construction of Const. Cal. art. 4, § 31, which provides that the legislature shall have no "power to make any gift, or authorize the making of any gift, of any public money or thing of value, to any individual, municipal, or other corporation, whatever."—*Yosemite Stage Co. v. Dunn*, Cal., 23 Pac. Rep. 369.

80. GIFTS—Unindorsed Note. — The possession by the widow of a note payable to testator, but not indorsed by him, nor shown to have been delivered to her, and evidence that he owed her money, are not sufficient to establish her right to the note. — *Buie v. Buie*, Miss., 7 South. Rep. 344.

81. GIFTS—Evidence.—After the death of an employee of a railroad company, the latter paid money to the widow and executrix on a voucher reading: "To Mrs. A. J. S., Dr.: For amount allowed, which would equal the salary of the late A. J. S., for the months of," etc., and indorsed: "For allowance:" *Held*, that the money did not belong to deceased's estate but was a gift to his widow, and it was immaterial that she did not know that it was a gift. — *In re Stevens' Estate*, Cal., 23 Pac. Rep. 379.

82. GUARANTY—Statute of Frauds. — A surety verbally agreed that, if one of the two principals would borrow the money and pay the indebtedness, and accept from his fellow-principal, as security for one-half the amount so paid, a second mortgage on his farm in which his wife refused to join, he, the surety, would indemnify him, and make good any loss he might sustain by being unable to make the amount out of the mortgaged property: *Held*, that the contract was an undertaking to become liable for the debt of another, within the statute of frauds, and void. — *Cheesman v. Wiggins*, Ind., 23 N. E. Rep. 945.

83. HIGHWAYS—Establishment. — Under Rev. St. Ind. 1881, § 5024, which makes it the imperative duty of the county commissioners to enter judgment refusing to establish a highway when the second viewers have reported against its utility, it is proper to dismiss an appeal from such judgment, the circuit court having no greater jurisdiction in the matter than the commissioners.—*Bowman v. Jobs*, Ind., 23 N. E. Rep. 976.

84. HIGHWAYS—Contributory Negligence.—Going up a defective sidewalk in a public street, knowing it to be defective, does not constitute contributory negligence, where the defect does not render the walk impassable, and the person injured uses due care in attempting to avoid injury.—*City of Fort Wayne v. Breese*, Ind., 23 N. E. Rep. 1037.

85. HOMESTEAD — Housekeeper. — Children residing with a debtor, who have no natural or legal obligation on him for support, being strangers in blood to him, do not constitute him a housekeeper with a family, so as to entitle him to the benefit of the homestead exemption law.—*Bosvsett v. Hall*, Ky., 13 S. W. Rep. 244.

86. HOMESTEAD—Liens on.—Land owned by a husband and wife as community property, and which had been laid off to them as a homestead, vested on the death of

the husband in the wife, not merely as community property, but as still retaining its character of a home stead, and that it was protected to the wife in the same manner that it had been to the family before the death of the husband. — *Mechanics' Building & Loan Association v. King*, Cal., 23 Pac. Rep. 876.

87. HOMESTEAD — What Constitutes. — Under Code Miss. 1880, §§ 1248, 1249, a homestead may be located partly within and partly without the limits of an incorporated town.—*Fitzgerald v. Rees*, Miss., 7 South. Rep. 341.

88. HOMESTEAD — Res Judicata. — In an action by a family to recover certain premises as a homestead the record of a former suit by defendant against the head of the family, which sustained the validity of a deed executed to defendant before the property was set apart as a homestead, though the suit was brought thereafter, was properly admitted in evidence, as the judgment against the head of the family was also binding on the family.—*Barfield v. Jefferson*, Ga., 11 S. E. Rep. 149.

89. HUSBAND AND WIFE — Separation. — A separation agreement between husband and wife, made while they are living apart, and in consideration of that fact, and of their agreement to continue to live apart, whereby they make a fair division of their community property, is valid.—*Rains v. Wheeler*, Tex., 13 S. W. Rep. 324.

90. HUSBAND AND WIFE—Conveyance Before Marriage. —A conveyance on the eve of marriage, to be regarded in equity as a fraud on the marital rights of the intended wife, must be made without her consent or knowledge.—*Murray v. Murray*, Ky., 13 S. W. Rep. 244.

91. INJUNCTION—Appeal — Supersedeas. — An appeal from an order dissolving an injunction does not of itself reinstate the injunction; but an appeal, and an order by the circuit judge or a justice of the supreme court, under the statute that the appeal shall operate as a *supersedeas* to the order appealed from, and a compliance with the terms of the *supersedeas* order as to giving bond, do restore the injunction. — *McMichael v. Eckman*, Fla., 7 South. Rep. 865.

92. INJUNCTION— Collection of Taxes. — Where a bank is required by law to pay the taxes assessed on all its shares, and reimburse itself from the shareholders, it may sue to enjoin collection of taxes illegally assessed, as it stands in the relation of a trustee, and such suit will save multiplicity of actions.— *Whitney v. Nat. Bank*, U. S. C. C. (La.), 41 Fed. Rep. 402.

93. INJUNCTION—Execution.—On injunction to restrain executions on judgments, the objection that the judgments were rendered more than a year before the filing of the petition is not good where the petition was filed within a year from the affirmance on appeal of one judgment, and the others were made to depend on that by stipulation of parties. — *Wills Point Bank v. Bates*, Tex., 13 S. W. Rep. 869.

94. INJUNCTION — Violation.—Where the enforcement of an order of sale on foreclosure of a trust deed has been enjoined on plaintiffs' petition claiming the land as their homestead, its sale under execution, issued on the judgment of foreclosure, while the injunction is still in force, is a contempt of court, and passes o title.—*Ward v. Billups*, Tex., 13 S. W. Rep. 308.

95. INJUNCTION—Garnishment. — A garnishee against hom a judgment has been obtained is not entitled to njunction to restrain the execution thereof, on a petition averring that he owes the principal defendant nothing, and that the judgment is erroneous.—*Gibson v. Cohen*, Ga., 11 S. E. Rep. 141.

96. INSOLVENCY—Exemptions.—Where a petitioner in insolvency claims certain posts as exempt as fire-wood, in good faith, the fact that he thereafter sells them, their value being small, is no ground for reversing an order of discharge.—*In re Bowman*, Cal., 23 Pac. Rep. 875.

97. INSURANCE—Insurable Interest.—The provision in the railroad companies' bills of lading, that they shall not be liable for loss by fire does not relieve them from liability for loss arising from their own negligence or that of their servants, and against such latter loss they may insure themselves.—*California Ins. Co. v. Union Compress Co.*, U. S. S. C., 10 S. C. Rep. 365.

98. INSURANCE—Conditions of Policy.—To put a lessee in possession of insured property under a contract that he shall buy the property on the termination of the lease, or, at his option, at any time during its continuance, is a breach of a condition of the policy that it shall become void if any change takes place in the title or possession.—*Smith v. Phenix Ins. Co.*, Cal., 23 Pac. Rep. 383.

99. INSURANCE—"Vacant and Unoccupied."—A building insured as a morocco factory, which is vacated by the tenants, and its key given to the owner's renting agent, who visits it occasionally, is unoccupied, within the meaning of a clause in the policy making it void, if the building become vacant or unoccupied.—*Halpin v. Ætna Fire Ins. Co.*, N. Y., 23 N. E. Rep. 968.

100. INSURANCE—Personal Property.—A fire insurance policy on mill machinery and apparatus apart from the building in which it was contained provided that "if a building covered by this policy shall become vacant or unoccupied, or if a mill or manufactory shall stand idle, without notice to, and the consent of, the company clearly stated hereon all liability hereunder will thereupon cease:" *Held*, that the machinery did not constitute a "mill" within the meaning of the provision, and that its standing idle would not create a forfeiture.—*Halpin v. Insurance Co.*, N. Y., 23 Rep. 989.

101. INSURANCE—Conditions—Waiver.—A provision in a fire insurace policy that, in case of loss the amount of "loss of damage" shall be ascertained by arbitration, and shall not be payable until it is so ascertained, and that such arbitration shall be a condition precedent to bringing suit on the policy, is reasonable and valid.—*Chippewa Lumber Co. v. Phenix Ins. Co.*, Mich., 44 N. W. Rep. 1055.

102. INSURANCE—Conditions.—The policy of insurance issued to plaintiff, on a dwelling and certain personal property therein was conditioned to be void if the house became "vacant or unoccupied." When the tenant who occupied the house left it, the agent who issued the policy verbally informed the plaintiff that the insurance would be good for 30 days, and that the house would be considered as occupied from the fact that plaintiff's goods remained in it: *Held*, that the insurer was bound by the declaration of its agent, which was not a waiver of the terms "vacant or unoccupied." —*Hotchkiss v. Phenix Ins. Co.*, Wis., 44 N. W. Rep. 1406.

103. JAIL AND JAILER — Imprisonment. — Under Rev. St. Ind. 1881, § 992, allowing prisoners to be discharged in certain cases after having been "imprisoned in the jail of the county for a period of 12 months," the facts that a prisoner, while in the custody of the sheriff was not locked in his cell at night, and that during part of the year he worked upon the streets under the sheriff's direction, do not show that he was not "imprisoned."—*State v. Woodward*, Ind., 23 N. E. Rep. 968.

104. JOINT-OWNERS—Right to Possession.—One jointly interested with another in cotton raised by himself on the other's land cannot recover possession of the cotton as against a purchaser from the other, by a possessory warrant sued out by himself alone.—*Askew v. Nicholson*, Ga., 10 S. E. Rep. 1089.

105. JUDGE—Disqualification.—Under How. St. Mich. § 7245, disqualifying judges for "consanguinity or affinity to either of the parties," a judge who is a nephew by marriage to complainant and a cousin by marriage of the others, cannot sit in a foreclosure suit —*Horton v. Howard*, Mich., 44 N. W. Rep. 1112.

106. JUDGMENT—Res Judicata.—Where a bill in equity for the specific enforcement of a contract also prays relief on the ground of fraud and breach of trust, and the bill is dismissed on the hearing for want of equity, such decree is conclusive against the right of the same party to sue at law for damages for breach of such contract since the court of equity has jurisdiction in such a suit

to determine the question of damages. — *Stickney v. Goudy*, Ill., 23 N. E. Rep. 1034.

107. JUDGMENT—Joinder.— Under Rev. St. Tex. art. 3210, which provides that judgments may be revived by *scire facias*, a proceeding to revive a judgment against a city may be joined with an application for a *mandamus* to enforce its collection.—*City of Houston v. Emery*, Tex., 13 S. W. Rep. 264.

108. JUDGMENTS.— The judgment of a court of competent jurisdiction of a foreign county, in a suit between the same parties and in which defendant appeared by counsel, will be *held* conclusive, in the absence of fraud.—*McMulled v. Richie*, U. S. C. C. (Ohio), 41 Fed. Rep. 502.

109. JUDICIAL SALES.—Where mortgaged property, the fair value of which is shown not to exceed $900, is sold on foreclosure for $890, the fact that one who was present at the first sale is willing to pay $1,000 for the property is no ground for ordering a resale.—*Page v. Kress* Mich., 44 N. W. Rep. 1052.

110. LANDLORD AND TENANT— Removal of Crops.—A tenant seeking to remove from the premises any portion of the commercial crops before the rent is due, without his landlord's consent is subject to distraint immediately, no matter what may be the purpose or intent of such removal.—*Daniel v. Harris*, Ga., 10 S. E. Rep. 1013.

111. LANDLORD AND TENANT — Conversion.— Where landlord and tenant agree to share equally in the crops, the title to remain in the landlord until all the indebtedness of the tenant to him should be fully paid, the tenant to prepare the cotton for market, as rapidly as it can reasonably be done, by picking it, and carrying it to any gin selected by the landlord, and thence to market, the refusal of the tenant to stop his laborers in gathering the remainder of the crop in the fields, in order to comply with the landlord's request to gin, pack, and send to market the portion already gathered is not such a conversion as to authorize a recovery in trover by the landlord.—*Forehead v. Jones*, Ga., 10 S. E. Rep. 1050.

112. LIBEL—EVIDENCE.—In an action for libel, in publishing that plaintiff had been compelled to leave his former place of residence to escape punishment by a mob, a letter, not under oath, written and signed by reputable citizens of the place, four months before the alleged departure of plaintiff giving him a good character, is neither admissible as part of the *res gestæ*, nor to contradict a witness for defendant, who testifies that plaintiff was, at the time of his departure, denounced by good citizens.—*Jones v. Duchow*, Cal., 23 Pac. Rep. 371.

113. LIEN—Laborers. — The special lien of a laborer applies only to the products of his labor, and the foreclosure of such lien entitle him to participate in the proceeds of other personal property before the court for distribution, although the affidavit of foreclosure, and the *fi. fa.* issued thereon, embrace such other property.—*Boyce v. Poor*, Ga., 10 S. E. Rep. 1094.

114. LIEN—Laborers.— The general laborer's lien on personalty takes precedence over ordinary mortgages, even those created prior to the contract for labor, unless they also antedate the statute providing for laborers' liens.—*Alfred v. Hale*, Ga., 10 S. E. Rep. 1095.

115. LIVERY STABLE KEEPERS.—The lien given by section 17, ch. 90, Gen. St. 1878, as amended by chapter 81, Laws 1885, depends on possession of the property, so that if the party entitled to the lien, voluntarily and without reservation deliver the property to the owner, his lien is gone.—*Ferriss v. Screiner*, Minn., 44 N. W. Rep. 1083.

116. LIFE INSURANCE —Assignment. —A creditor to whom his debtor transfers a life insurance policy by bill of sale absolute on its face, acquires no greater interest in the policy than such sum as will pay his debt and interest, and premiums paid by him and interest.—*Cawthorn v. Perry*, Tex., 13 S. W. Rep. 268.

117. LIFE INSURANCE—Assignment. — An absolute assignment of a life insurance policy to a creditor only gives him title to enough of the proceeds to satisfy his debt and disbursements, with interest.—*Levy v. Gillard*, Tex., 13 S. W. Rep. 304.

118. LIMITATION OF ACTIONS—Corporations.—The provisions of Rev. St. Ill. ch. 32, § 16, which makes the directors and officers of a corporation whose indebtedness exceeds the amount of its capital stock personally liable for such excess if they assent thereto, are not penal, within the meaning of Rev. St. Ill. ch. 83, § 14, which makes the lapse of two years a bar to an action for a statutory penalty. — *Wolverton v. Taylor*, Ill., 23 N. E. Rep. 1007.

119. LIMITATION OF ACTIONS—Municipal Corporations. —A declaration made by the secretary of a city, in his annual statement to the council, that there is a certain amount of interest due on certain city bonds, is not an acknowledgment of the debt, within the meaning of the statute of limitations, when it does not appear that the secretary had authority to bind the city by his statement, or that such statement was approved by the council. — *City of Houston v. Jankowskie*, Tex., 13 S. W. Rep. 269.

120. LOGGING—Tolls — Statute. — The special law authorizing the plaintiff to improve the navigability of a specified part of the St. Louis river, to assume control of logs driven down the river and to charge specified tolls: *Held*, not to be so uncertain or indefinite as to be ineffectual. — *St. Louis, etc. Imp. Co. v. Nelson Lumber Co.*, Minn., 44 N. W. Rep. 1080.

121. MALICIOUS PROSECUTION — Opening Letters. — In an action for malicious prosecution for unlawfully opening a letter addressed to defendant, evidence that defendant authorized plaintiff to open the letter is admissible in order to show malice and want of probable cause, though such authorization is not specially pleaded.—*Sutor v. Wood*, Tex., 13 S. W. Rep. 321.

122. MANDAMUS— Judicial Discretion. — As to judicial discretion in the granting of *mandamus*. — *Territory v. Woodbun*, N. Dak., 44 N. W. Rep. 1077.

123. MARRIED WOMEN— Implements. — Where a married woman possessed of a separate estate, real and personal, indorses notes in order to obtain security for an indebtedness owing to her by the maker of the notes, who thereupon executes to her a mortgage to secure her debt, and also the notes which she indorsed, the indorsement is binding upon her.— *Snowman v. Lee*, Mich., 44 N. W. Rep. 1061.

124. MASTER AND SERVANT— Wrongful Discharge.— A clerk in a store employed by the month, who is unjustly discharged before the end of the month, is not obliged, in order to recover for the breach of the contract, to immediately seek for employment of a different character, but has a right to seek, for a reasonable time, the same character of employment that he had when discharged.—*Simon v. Allen*, Tex., 13 S. W. Rep. 296.

125. MASTER AND SERVANT — General Issue. — In an action for breach of contract in discharging plaintiff from defendant's employment without due cause, after having employed him for a year, evidence that plaintiff was inefficient is not admissible under the general issue.—*Jacobus v. Wood*, Ga., 10 S. E. Rep. 1099.

126. MASTER AND SERVANT—Fellow-servants. — A railroad yard switchman and a locomotive engineer are not fellow-servants.— *Louisville, etc. R. Co. v. Sheets*, Ky., 13 S. W. Rep. 248.

127. MASTER AND SERVANT — Fellow-servants. — The carpenter, the porter, and the stewardess of a steamship, all of whom have signed shipping articles, are fellow-servants, though the former belong to that division of the ship's company known as the "deck department," and the two latter to the "steward's department;" such divisions being made merely for convenience of administration, and the captain of the ship being in command of the whole. — *Quebec S. S. Co. v. Merchant*, U. S. S. C., 10 S. C. Rep. 397.

128. MASTER AND SERVANT—Infants.— Under Code Ga. §§ 4294, 4295, it is a question for the jury whether a boy thirteen years old has sufficient discretion to relieve from liability a master at the request of whose servants the boy assists in doing dangerous work, while employed in which he is killed.—*Rhodes v. Georgia, etc. Co.*, Ga., 10 S. E. Rep. 922.

129. MASTER AND SERVANT—Fellow-servants. — A railroad company is not liable for an injury to its brakeman, caused by a want of sufficient sand in the sand-box on the engine, if the insufficiency be due to the failure of that servant whose duty it is to fill the sand-boxes suitably, before the trains start to perform his duty properly, when it does not appear that the company was negligent in his selection and retention, as he is a fellow-servant of the brakeman.— *Louisville, etc. Ry. Co. v. Petty*, Miss., 7 South. Rep. 351.

130. MASTER AND SERVANT—Negligence.— In an action against a railroad company for negligence in the construction of its road, whereby an employee was killed, the declaration is not rendered insufficient to support a judgment by the fact that it does not state that the defendant knew of the defect in the road, or that plaintiff did not know of it.—*Chicago, etc. Ry. Co. v. Hines*, Ill., 23 N. E. Rep. 1021.

131. MASTER AND SERVANT— Wages. — Where a master employs a servant to work on his farm at an agreed rate of wages, which he does until the farm is sold, and two weeks thereafter the master requests the servant to work at his livery stable, nothing being said as to wages, there is no presumption that the rate of wages agreed on at first applies to the second hiring.—*Ingalls v. Allen*, Ill., 23 N. E. Rep. 1026.

132. MASTER AND SERVANT—Contract. — A person employed by a railroad company to clear off and burn the rubbish from its right of way at so much per mile, who hires, pays, and controls his own help, is not a servant of the company, but an independent contractor. — *St. Louis, etc. Ry. Co. v. Yonley*, Ark., 13 S. W. Rep. 333.

133. MECHANICS' LIENS—Procedure.— Where notes are given for the payment of the amount due a contractor for work and material furnished in putting in pipes, radiators, etc., for steam-heating a building, and copies of such notes are duly filed in the proper office, accompanied by an affidavit of the proper party, setting forth that the debt was incurred under a contract with the owner of the building for the putting in of such material in said building, and that said notes are unpaid, etc., for the purpose of obtaining a lien under the statute upon the premises, they are sufficient to entitle the party to a lien. — *Knutzen v. Hanson*, Neb., 44 N. W. Rep. 1065.

134. MINES AND MINING—Claims.— Under Rev. St. U. S. § 2319, providing that all mineral deposits in public lands shall be free, and open to exploration and purchase, and the lands in which they are found, to occupation and purchase by citizens of the United States, and those who have declared their intention to become such, one who is not a citizen, and who has not declared his intention to become such, acquires no rights by posting a notice of claim.— *Anthony v. Jillson*, Cal., 28 Pac. Rep. 419.

135. MINES AND MINING — Lien. — The term "mining claim," as used in § 1183, giving a lien on a mining claim to persons performing labor, etc., applies to a mine, the title to which has been acquired in fee, as well as to a mining claim in its technical sense. — *Bewick v. Muir*, Cal., 28 Pac. Rep. 389.

136. MORTGAGE—Foreclosure Sale.— Under Code Miss. § 1935, providing that, in foreclosure proceedings, upon report of sale, the court shall give personal judgment for such balance as defendant may be liable for, motion for such judgment need not be made at the term of court when the sale is confirmed, but at any time before the execution of the decree is barred by limitation. —*Weir v. Field*, Miss., 7 South. Rep. 355.

137. MORTGAGES—Alterations. — A mortgage, in which the character "&" and a word or name following the name of the mortgagee are erased, recited that "the first-named parties" had made a "loan to the third party," the mortgagor. Below the signatures of the grantor and officer, and above that of a witness, there was an erasure of what appeared to be two names, apparently of witnesses: *Held*, that the mortgage was valid, as against the heirs of the mortgagor suing for the land.—*Rodriguez v. Hayes*, Tex., 13 S. W. Rep. 296.

138. MORTGAGES — Description. — Where a mortgage shows that the parties reside in the State, and describes the land according to the United States government survey and legal subdivisions, but does not state the county and State where the land is situated, it will be presumed to be in the State mentioned, and the mortgage may be foreclosed by advertisement. — *Smith v. Green*, U. S. C. C. (Minn.), 41 Fed. Rep. 455.

139. MORTGAGES—Mistake. — Where a lot intended to be conveyed is by mistake omitted from a mortgage, but public notice of the mistake and of the mortgagee's claim is given, the mortgagee's claim on the omitted lot is superior to that of a subsequent purchaser under execution against the mortgagor. — *Ilse v. Seinsheimer*, Tex., 13 S. W. Rep. 329.

140. MUNICIPAL CORPORATION—Street Improvement.— Power given a city to levy assessment to pay for "graveling" and paving" streets includes the power to "curb" "grade" and "gutter." — *McNair v. Ostrander*, Wash., 23 Pac. Rep. 414.

141. MUNICIPAL CORPORATIONS — Rescission of Contract.—A city, by ordinance, granted a franchise to S and his assigns, for thirty years, to construct and maintain water-works: *Held*, that the acceptance covered only the construction of the works, and did not deprive the city of its right to a rescission of the contract in case S or his assigns thereafter failed to comply with the stipulations in the ordinance as to the quantity and quality of the water to be supplied; such stipulations being conditions precedent to the continuing right to the franchise.—*Farmers' Loan, etc. Co. v. City of Galesburg*, U. S. S. C., 10 S. C. Rep. 316.

142. MUNICIPAL CORPORATIONS — Polluted Wells. — Liability of city for death caused by drinking impure water from a public well. — *Danaher v. City of Brooklyn*, N. Y., 23 N. E. Rep. 745.

143. MUNICIPAL AID BONDS—Recitals.—As against *bona fide* holders of municipal bonds, which recite that they are issued in pursuance of a certain act of the legislature which authorizes certain commissioners to borrow money on the faith and credit of the town, and execute bonds therfor, after a majority of the tax-payers had assented thereto, which fact should be proved by the affidavit of the town assessor, the defenses that the consent of a majority of the tax-payers was not given; that the affidavit of the assessor to that effect was not true; and that the commissioners did not borrow money on the bonds, but disposed of them without lawful consideration,—are not availing.— *Inhabitants of the Township of Bernards v. Morrison*, U. S. S. C., 10 S. C. Rep. 333.

144. NATIONAL BANKS—Unlawful Dividends.—The personal liability of directors of a national bank for violation of Rev. St. U. S. § 5204, by declaring dividends in excess of net profits, and of § 5200, for loaning to separate persons, firms, or corporations amounts exceeding one-tenth of the capital stock, cannot be enforced in an action at law.—*Welles v. Graves*, U. S. C. C. (Iowa), 41 Fed. Rep. 489.

145. NATIONAL BANKS—Taxation of Shares. — Laws N. Y. 1880, ch. 596, § 3, which provides that the stockholders in banks and trust companies organized under the authority of the State, or of the United States, shall be assessed for the value of their shares of stock, but which omits to provide for the taxation of the shares of stock in other private corporations, does not contravene Rev. St. U. S. § 5219, which forbids the taxation of shares in national banks at a greater rate than is assessed on other "moneyed capital" in the hands of the individual citizens of the State.—*Palmer v. McMahon*, U. S. S. C., 10 S. C. Rep. 324.

146. NEGLIGENCE — Opinion Evidence. — In an action for burning cotton, by sparks from defendant's engines, where it appears that the cotton was loaded by plaintiff on flat-cars, without covering, the opinion of a witness as to whether or not it would have burned if it had been loaded in box-cars or covered is not admissible.—*Louisville, etc. Ry. Co. v. Natchez, etc. R. Co.*, Miss., 7 South. Rep. 350.

147. NEGLIGENCE. — A person heedlessly standing in the carriage way of a public street after night-fall, engaged in conversation, cannot recover for injuries received from a carelessly driven vehicle, when it appears that the driver did not see the plaintiff in time to avoid the collision. — *Evans v. Adams Exp. Co.*, Ind., 23 N. E. Rep. 1039.

148. NEGLIGENCE—Usage and Custom.—An established usage or custom among men engaged in the same line of work cannot be given in evidence to justify or excuse the commission of an act negligent in itself. — *Larson v. Tobin*, Minn., 44 N. W. Rep. 1078.

149. NEGLIGENCE—Reckless Driving. — Where defendants entered into a race on the street of a city, and, while driving "at an unlawful and negligent rate of speed, much faster than six miles an hour," collided with each other, near plaintiff's sleigh, in such manner as to frighten plaintiff's horses, and cause them to run away, and injure plaintiff, the latter may maintain an action for the injuries sustained, independent of an ordinance of the city prohibiting driving faster than six miles an hour on such street. — *Middlestadt v. Morrison*, Wis., 44 N. W. Rep. 1103.

150. NEGLIGENCE—Warehousmen. — In an action for personal injuries resulting from the alleged negligent manner in which defendant had stowed freight in its warehouse, it is proper to refuse an instruction that, as the accident occurred while the freight was being handled by the agents of the consignees, who had been notified of its being in the warehouse, and had taken control of it for the purpose of removing it, defendant was relieved from all liability, since this would absolve defendant, though it had stowed the freight so negligently as to be dangerous to any person attempting to move it, no matter how careful he might be. — *C. H. Mallory & Co. v. Smith*, Tex., 13 S. W. Rep. 199.

151. NEGOTIABLE INSTRUMENT—Deceit. — In an action on notes on which defendants were indorsers, they alleged that they were induced to sell the goods to the maker by the representations of M, as president of plaintiff bank, that the maker was solvent, and that, if defendants would sell the goods, and take the notes therefor, plaintiff would discount them, and look to the makers alone for payment: *Held*, that evidence of representations made by M before the organization of plaintiff, and also thereafter, at the time of the taking by defendants of one of the notes in settlement for goods previously sold the maker, did not support the allegations, and was inadmissible.— *Alpena Nat. Bank v. Greenbaum*, Mich., 44 N. W. Rep. 1123.

152. NEGOTIABLE INSTRUMENT — Non-negotiable Note. —Where defendant, in an action by an indorsee of a non-negotiable note given by defendant for the purchase of a lightning-rod, testifies that the agent agreed to put up the rod as a sample for a sum much less than that expressed in the note, it is error to charge the jury that, if there should be a recovery, it must be for the full amount of the note.—*Closs v. Thiefels*, Mich., 44 N. W. Rep. 1045.

153. NEGOTIABLE INSTRUMENT—Consideration.—Under Code Ga. §§ 1552a, and 2745, *held*, in an action on a note for the price of fertilizer, put up in bags, that the contract was entire, and, if any one of the bags was not branded as required, the consideration was illegal to that extent, and the whole promise failed.—*Allen v. Pearce*, Ga., 10 S. E. Rep. 1015.

154. NEW TRIAL—Terms.— Rev. St. Tex. art. 1368, provides that new trials may be granted "on such terms and considerations as the court shall direct." An order granting a new trial directed the party to whom it was granted to pay witness fees "as a condition upon which" such new trial was granted: *Held*, that the payment of the fees was the "terms" on which the order was made, and not a condition on performance of which it should take effect. — *Fenn v. Gulf, etc. Ry. Co.*, Tex., 13 S. W. Rep. 273.

155. NEW TRIAL—Judgment.—Under a statute allowing a defendant to file a motion for a new trial at any time during the term, it is not error to render judgment of conviction before such motion is filed, when the defendant is afterwards allowed to file his motion.—*Quinn v. State*, Ind., 23 N. E. Rep. 977.

156. OFFICERS— Removal. — Pol. Code Cal. § 368, provides for the appointment of pilot commissioners "by the governor, with the consent of the senate." Section 396, provides that their term of office shall be "during the governor's pleasure." Section 2440 provides that these commissioners are to be appointed "by the governor, by and with the advice of the senate." And § 2442 provides that they shall "hold their offices during the pleasure of the power appointing them, not exceeding four years from the date of their commissions:" *Held*, that the commissioner cannot be removed by the governor without the consent of the senate. — *People v. Freese*, Cal., 23 Pac. Rep. 378.

157. OFFICIAL BONDS— Pleading. — A bond given by a contractor for building a gravel-road, being required by statute, is an official bond, within the meaning of Rev. St. Ind. 1881, § 1221, and such a bond, when payable to the county commissioners instead of to the State, as it should be, and conditioned merely for the faithful performance of the contract, will yet render the obligors liable to the full extent contemplated by § 4246. —*Faurote v. State*, Ind., 23 N. E. Rep. 971.

158. PARTITION — Adverse Title. — In a partition suit, where the complaint alleges that complainants and defendant are the heirs at law of the former owner of the land, defendant being in possession, is not estopped to deny that she entered on the land under such common title, and to set up the adverse title of her deceased husband.—*Cooper v. Fox*, Miss., 7 South. Rep. 342.

159. PARTITION—Appeal. — In partition proceedings a judgment for partition and order of sale are interlocutory merely, and are not final judgments, within the meaning of Rev. St. Mo. 1889, § 7184, providing that appeals and writs of error will lie from a final judgment in partition proceedings. — *Buller v. Linzee*, Mo., 13 S. W. Rep. 344.

160. PARTITION—Creditor.—Upon showing good cause, partition may be ordered at the instance of a creditor holding an absolute deed from one of the tenants in common as security for a debt; but without good cause, partition in opposition to the will of the debtor of such creditor should be denied. — *Welch v. Agar*, Ga., 11 S. E. Rep. 149.

161. PARTNERSHIP— Dissolution. — Though a partner has purchased the interest of his copartner in the partnership and its assets, he can recover from the latter one-half the amount of a private debt due him which had been collected by the copartner, and mixed with the firm assets.—*Pierce v. Ten Eyck*, Mont., 23 Pac. Rep. 423.

162. PLEADING—Copy of Instrument Sued On.— Under Rev. St. Ind. 1881, § 362, which provides that, when any pleading is founded on a written instrument, such instrument, or a copy of it, must be filed with the pleading, a complaint for breach of covenant in a deed, where neither the deed nor a copy of it is filed, is insufficient to sustain a judgment by default, even when questioned for the first time on appeal. — *Old v. Mohler*, Ind., 23 N. E. Rep. 967.

163. PLEADING— Answer. —Where the first paragraph of a complaint is for services and materials furnished under a special contract, and the second seeks to recover for such services and materials under a *quantum meruit*, an answer setting up breach of the special contract, without denying that defendant received the benefit of plaintiff's services and materials, is demurra-

ble, when pleaded as a defense to the entire complaint, since it does not constitute a defense to the second paragraph.—*Everroad v. Schwartzkopf*, Ind., 23 N. E. Rep. 969.

164. PLEADING.—A difference between the amount for which judgment is demanded in a complaint, and the amount of items in a bill of particulars, is an immaterial variance, as plaintiff is confined to the latter in his proof unless it is amended.— *Cudworth v. Gaynor*, Wis., 44 N. W. Rep. 1103.

165. PRINCIPAL AND AGENT.— Where a land owner employs an agent to procure a purchase for his real estate upon certain terms and conditions, the contract of employment need not be in writing. — *Griffith v. Woolworth*, Neb., 44 N. W. Rep. 1137.

166. PRINCIPAL AND SURETY.—The rule that a surety is discharged when the means of protecting himself are parted with by him in consequence of assurances made to him by the creditor is applicable to the facts of this case (for which see the official report), and was correctly applied by the court.— *Matthews v. Everett*, Ga., 11 S. E. Rep. 135.

167. PUBLIC LANDS— Homestead.— A deserted wife, left in possession of a homestead, and recognized by the land department as having a right to contest the entry thereof by a subsequent claimant with notice, will be protected in her possession pending such contest and may recover damages against such claimant for his wrongful acts in dispossessing her, and removing and destroying the improvements left in her possession.—*Michaelis v. Michaelis*, Minn., 44 N. W. Rep. 1149.

168. PUBLIC LANDS— Water-rights. — Upon the filing of the homestead entry upon land in Dakota for which a patent is subsequently issued riparian rights in a stream flowing over the land become vested, and the waters thereof are no longer subject to the right of appropriation.—*Sturr v. Beck*, U. S. S. C. 10 S. C. Rep. 350.

169. QUIETING TITLE—Equitable Interest.—Where one levies execution on an alleged equitable interest in land, and fails to institute proceedings within a year to determine the rights and equities of the judgment debtor, as required by How. St. Mich. § 6108, allowing such levy, he is guilty of laches, and the holder of the legal title may maintain a bill to discharge such levy as a cloud on his title.—*Edsell v. Nevins*, Mich., 44 N. W. Rep. 1115.

170. RAILROAD COMPANY—Street Railway.— Question of negligence on part of street car company in stopping on the wrong side of the street, in disobedience of city ordinance.—*North Burmingham St. R. Co. v. Calderwood*, Ala., 7 South. Rep. 360.

171. RAILROAD COMPANIES—Killing Stock.—While Act Wash. T. Nov. 28, 1883, §§ 2-7, providing that the value of stock killed on a railroad shall be assessed by appraisers, and the amount thereupon become due and payable are unconstitutional as denying the right of trial by jury, sections 1 and 8 making railroads liable for all stock killed on their tracks unless they are fenced, are not so connected with the rest of the act as to fall therewith and are valid.—*Oregon Ry. & Nav. Co. v. Dacres*, Wash., 28 Pac. Rep. 415.

172. RAILROAD COMPANIES — Trespasser. — A boy of eleven years, who climbs upon freight-cars standing on a side track at railroad depot, is a trespasser; and the railroad company, not knowing of his presence is not liable for injuries sustained by him in being thrown from the car by the concussion caused by attaching a train thereto.—*Louisville, etc. R. Co. v. Hurt*, Ky., 13. S. W. Rep. 275.

173. RAILROAD COMPANY.—If the business of a railroad does not warrant the running of separate trains for freight and passengers, it will not be required to do so; but if the business is sufficiently large and profitable to warrant it, and the safety of passengers is endangered by having passenger-coaches mixed in the same train with freight-cars, it is the duty of the company to run separate trains.—*Arkansas, etc. R. Co. v. Canman*, Ark., 13 S. W. Rep. 280.

174. RAILROAD COMPANY— Crossing. — In an action against a railroad company for causing the death of one crossing its track, where the defense of contributory negligence is based upon the theory that the deceased might, by the exercise of ordinary care, have seen the aproaching train in time to avoid crossing the track until it had passed, it is error to instruct the jury that, "in the absence of direct evidence as to the conduct of deceased at the time of the accident, if the facts are consistent with plaintiff's theory that deceased exercised ordinary care," then they might find that there was no contributory negligence.—*Chicago, etc. Ry. Co. v. Halsey*, Ill., 23 N. E. Rep. 1028.

175. RAILROAD COMPANY—Negligence.—Rev. St. Wis. § 1809, which prohibits, in all cities and villages, trains running faster, "until after having passed all the traveled streets thereof," than six miles per hour, makes it unlawful for a train on entering a city, to run at a greater rate of speed than six miles an hour, though it has not yet arrived at any traveled streets.—*Hooker v. Chicago, etc. R. Co.*, Wis., 44 N. W. Rep. 1085.

176. RAILROAD COMPANY—Killing Stock.—After a town plat had been laid out, a railroad company removed its fences from the track, and put in cattle-guards. It had for a long time maintained a flag station there, and a side track, but had no depot master or clerk, and took up freight when flagged, as it did at any other point on that portion of the road. No tickets were sold to the town, which consisted of two houses and the store: *Held*, not to be "depot grounds," so as to exempt the railroad company from liability for horses killed there for want of fence.—*Anderson v. Stewart*, Wis., 44 N. W. Rep. 1091.

177. RAILROAD COMPANIES—Eminent Domain.—Under Const. Tex. 1876, art. 1, § 17, providing that no persons' property shall be taken or damaged for public use without just compensation being made, a railroad company cannot convey to another company part of the interest in land which it has acquired by purchase of a right of way, so as to enable the latter company to build and operate an additional road over such right of way, without the consent of the owner of the fee, unless by condemnation proceedings.—*Fort Worth, etc. R. Co. v. Jennings*, Tex., 13 S. W. Rep. 270.

178. RAILROAD COMPANIES —Eminent Domain. —The general railroad law of Missouri, making provision for the appropriation of lands "by any road, railroad, or telegraph corporation created under the laws of this State," gives to a railroad company created by special charter a mode of procedure to condemn land in addition to that given by its charter, and it may resort either to the provisions of its special charter, or to those of the general law.—*Corey v. Chicago, etc. Ry. Co.*, Mo., 13 S. W. Rep. 346.

179. RAILROAD COMPANIES— Crossings.— Where the owner of land conveys a right of way across it to a railroad company, with the right to construct aqueducts and drains, the company is not obliged, at common law, and irrespective of contract, to construct bridges for the use of the owner across ditches it has made in the construction of its road.—*Stewart v. Cincinnati, etc., Ry. Co.* Mich., 44 N. W. Rep. 1116.

180. RAILROAD COMPANIES—Priority of Lien.—A mortgage on the property of an old railroad corporation, successor to its property and franchises is entitled to priority over the claim of a creditor for services and advances to the old corporation, who did not obtain a judgment against either corporation until some years after the mortgage was given, and the nature of whose services and advances does not entitle him to a statutory lien on the property of the old corporation.—*Fogg, v. Blair*, U. S. S. C., 10 S. C. Rep. 338.

181. RAILROAD CORPORATION—Laborers.— Under Rev. St. Wis. § 1815, Laws Wis. 1881, ch. 318, independent contractors who have agreed to save the company harmless from the payment of laborers' wages are liable for the board of laborers working under a subcontractor, where such board is furnished in reliance on a custom

well known to all the parties, whereby the principal contractors each month deduct the amount due by each laborer for board from his wages, and pay such amount to the respective boarding-house keepers, and it is immaterial that the subcontractor is indebted to the principal contractors.—*French v. Langdon*, Wis., 44 N. W. Rep. 1111.

182. RAILROAD GRANTS—Taxation.—Act Cong. May 5, 1864, gave to the State of Wisconsin, to be transferred to a railroad company, a specified quantity of land, designated by alternate sections, along the route of the proposed railroad; and provided that if the government had, when the line of the road should be determined, sold or reserved any of the land thus granted, or if the right of pre-emtion or homestead had attached, other sections, within a prescribed limit, should be selected by a State agent, subject to the approval of the secretary of the interior: *Held*, that the indemnity clause covered losses from the grant by reason of sales and attachment of homestead and pre emption right previous to the date of the grant, as well as between such date and the date of the location of the railroad.—*Wisconsin Cent. R. Co. v. Price County*, U. S. S. C., 10 S. C. Rep 341.

183. REMOVAL OF CAUSES—Local Prejudice. — Under the removal act of March 3, 1887, a cause may be removed to the federal court on the ground of local prejudice, though the amount in controversy is less than $2,000, but over $500.—*Frishman v. Insurance Cos.*, U. S. C. C., (Kan.), 41 Fed. Rep. 449.

184. REMOVAL OF CAUSES — Residents. — Under Act Cong. 1887, § 2, providing for the removal of causes from a State to the circuit court, "by the defendant or defendants therein, being non-residents" of the State, a cause containing but a single controversy cannot be removed, where some of the defendants are residents of the State.—*Arkansas Valley Smelting Co., v. Cowenhoven*, U. S. C. C., (Colo.), 41 Fed. Rep. 450.

185. REMOVAL OF CAUSES.—Citizenship.—The provision of Act Cong. March 3, 1875, § 1 (18 St. U. S. 470), excepting from the original jurisdiction of the federal courts suits by assignees which could not have been brought there by the assignors, does not apply to suits brought in State courts, and thence to the circuit court of the United States.—*Board of Commissioners v. Diebold Safe and Lock Co.*, U. S. S. C., 10 S. C. Rep. 399.

186. SALE—Delivery. — Where a contract of sale provided that on the receipt of the goods at the depot of the transportation company at M, the purchaser should accept a draft at five days' sight, the sellers must deliver the goods in such a manner as to enable the purchaser to demand them of the transportation company; and, in an action for the non-acceptance of the draft, where it appears that the sellers issued the bill of lading to themselves, and attached it to the draft, and instructed their agents not to deliver it to the purchaser until the draft had been paid, the purchaser is not liable. — *Doyle v. Roth Manuf'g Co.*, Wis., 44 N. W. Rep. 1100.

187. SALE— Action for Price. — In an action on a note given for the price of a chattel bought for a particular purpose, whether on an express or implied warranty, with or without fraud, it is not necessary that the purchaser should return the article, or offer to return it, or rescind the contract, or that such article should be wholly worthless, in order that he may avail himself of his plea of a failure of consideration; but if he retains the article, and does not offer to return it, and such article is not wholly worthless, such plea can avail him only to the extent of the difference between the value of the article, had it been what it was represented to be, and its value such as it is shown to be.— *Brown v. Weldon*, Mo., 13 S. W. Rep. 342.

188. SALE—When Title Passes.—An absolute bill of sale for 100,000 feet of mill culls, for which payment is made at once, passes title to the property sold, though it be not yet separated from a larger mass, where the separation is to be made by the purchaser. — *Wagar v. Detroit, etc. R. Co.*, Mich., 44 N. W. Rep. 1113.

189. SALE BY EXECUTOR. — An executor who waives a cash payment on a public sale of land belonging to his decedent's estate, and who puts the purchaser into possession under an independent contract whereby the purchase money is not to be paid until the widow's claims for dower and for a year's support have been settled, and who subsequently receives a part of the purchase price, loses the right given him by Code Ga. § 3655, to resell the land at the purchaser's risk on his failure to pay the balance of the purchase money. — *Penn v. Willingham*, Ga., 10 S. E. Rep. 1085.

190. SALE—Rescission.—In an action for the rescission of a contract for the sale of land, whereby the plaintiff agreed to make a deed to defendant as soon as a survey of the land was made, for default in the payment of purchase money, where the petition shows that plaintiff has not executed such deed, he is not entitled to a rescission without an allowance to defendant of the excess of the purchase money already paid, and permanent improvements put on the land, over the value of the use and occupation of the land while he was in possession of it. — *Moore v. Giesecke*, Tex., 13 S. W. Rep. 290.

191. SCHOOL-DISTRICT—Incorporation.—Under Sayles' Ann. St. Tex. art. 541a, which authorizes "towns and villages" to incorporate for school purposes only, a tract of land containing twenty eight square miles, not more than two of which is covered by a town, cannot be incorporated as a town for school purposes only. — *State v. Eidson*, Tex., 13 S. W. Rep. 263.

192. SUNDAY CONTRACTS—Sale.—In a suit in Mississippi on a contract executed in another State, the defense that the contract was made on Sunday, and is void, cannot be set up, if it is not void under the law of the State in which it was made.—*McKee v. Jones*, Miss., 7 South. Rep. 348.

193. TAXATION.—The action of an assessor in assessing mortgages, unaccompanied by other evidence of indebtedness, at their face value, and lands at from one-fourth to one-fifth of their value, is in violation of Rev. St. U. S. § 1924, declaring that all taxes shall be equal and uniform, and no distinction shall be made in the assessment of different kinds of property, which shall be according to the value of the property. —*Andrews v. King County*, Wash., 23 Pac. Rep. 409.

194. TAXATION—Voluntary Payment.—Where a person pays an illegal tax which he believes to be unjust, and the legality of which he is not adverse to testing, when no process has issued for its collection, the payment is voluntary, and he cannot recover the amount paid. — *City of Houston v. Feizer*, Tex., 13 S. W. Rep. 266.

195. TAXATION. — In case of an illegal tax assessed against personal property, where there is no fraud, an injunction will not be granted unless it is shown that the recovery of damages on account of its enforcement would not be an adequate redress. — *Dawson v. Croisan*, Oreg., 23 Pac. Rep. 257.

196. TAXATION — Local Assessments. — Where a provision was made in a grant to a railroad company by the former territory of Minnesota, while the territory of Dakota was a part thereof, exempting its property from all taxation:" *Held*, that the real estate of said company was not thereby exempted from an assessment for local municipal improvements; that such an assessment was not taxation, within the meaning of the grant. — *Winona, etc. R. Co. v. City of Watertown*, S. Dak., 44 N. W. Rep. 1072.

197. TAX-SALES—Redemption.—A tender of the amount of purchase money at a tax sale, without also tendering the premium allowed by law, will not accomplish redemption; and for the purchaser to name a larger amount than he was entitled to, while it would dispense with production of the money tendered, would not dispense with full readiness to pay at the time of offering to redeem.—*Lamar v. Sheppard*, Ga., 10 S. E. Rep. 1084.

198. TAX-TITLE. — Payment of taxes for seven successive years, under color of title, when made during the life of the former owner, does not bar his wife's in-

choate right of dower.—*Miller v. Pence*, Ill., 23 N. E. Rep. 1030.

199. TAX-TITLES. — The fact that the purchaser at a tax-sale is the daughter of the tax-payer, and that the husband and trustee of the latter made the bids, and handed in the money, is not enough to stamp the transaction as fraudulent, nor to shift the burden on the purchaser of showing that the money used in the purchase was hers.— *Thorington v. City Council*, Ala., 7 South. Rep. 363.

200. TRUSTS—Possession of Trustee. — The possession of a trustee, under a deed of trust, before foreclosure, is insufficient to sustain an action for the conversion of crude turpentine, taken from trees on the land before his possession was acquired, and sold to defendant. — *Farmers' Loan, etc. Co. v. Avera*, Miss., 7 South. Rep. 358.

201. TELEGRAPH COMPANY— Mistake. — Where a telegraph company undertakes to transmit a message correctly to another State, and fails to do so, it is liable for a breach of its contract, and the party injured may recover all the damages which he sustains by reason of such breach. — *Kemp v. Western Union Tel. Co.*, Neb., 44 N. W. Rep. 1064.

202. TRIAL—Jury.—Where questions of fact submitted to a jury are not fully and substantially answered, the court, on application of either party, should instruct the jury to fully and explicitly answer them.—*American Cent. Ins. Co. v. Hathaway*, Kan., 23 Pac. Rep. 428.

203. TRIAL—Burden of Proof.—It is error to charge the jury that, "if the plaintiff fails to make out his case, or if you have any doubt as to whether the plaintiff has made out his case fully, the defendant should have a verdict, because it is the plaintiff's duty to make out his case before he is entitled to recover," as this requires too much of plaintiff.— *Standard Machinery Co. v. Holton*, Ga., 10 S. E. Rep. 1016.

204. TRUST-DEED—Substitution of Trustee.— Where a trust-deed gives the power to appoint a substituted trustee in case the original trustee refuses or fails to act, the appointment of a substituted trustee while the original trustee is advertising the property for sale under the trust-deed confers no title on the substituted trustee.—*Chestnutt v. Gann*, Tex., 13 S. W. Rep. 274.

205. TRUSTS—Equity Jurisdiction.— Where on dissolution of a corporation, owning a large number of town lots, such lots are given to a committee of stockholders, to be used for the benefit of the town, and the committee conveys the same to the mayor of the town, who conveys them to various persons, with the assent of the committee, a court of equity will not, after the lapse of thirteen years, inquire into the execution of the trust by such committee, in a suit between the stockholders of the corporation, to which the mayor's grantees are not parties. — *Norton v. Kellogg*, U. S. C. C. (Kan.), 41 Fed. Rep. 452.

206. USURY — Lex Fori. — A note was executed in Georgia by a resident of that State, and secured on land situate therein, in consideration of a loan by the agent of a resident of Massachusetts, where the note was made payable. The agent retained out of the sum for which the note was given an amount of interest which was usurious under the laws of Georgia: *Held*, that though, as a general rule, the interest which a contract should bear is governed by the law of the place where it is to be performed, the note would not be enforced in Georgia to the extent of the usury. — *Martin v. Johnson*, Ga., 10 S. E. Rep. 1092.

207. VENDOR AND VENDEE. — Where a person who claims a right to have a deed of land from a railroad company, contracts to convey a portion thereof, but afterwards abandons his claim by a compromise with the company, and the latter has notice of the contract of sale, the vendee, in an action to enforce his right against the company, must establish by proper allegations of fact, his vendor's right to a deed; and an allegation that the vendor became entitled to the land, or to a decree for its conveyance is insufficient. — *Freytag v. Northern Pac. R. Co.*, Wash., 23 Pac. Rep. 402.

208. VENDOR AND VENDEE.— After a deed of land, and notes and trust-deed for part of the purchase price, had been delivered, the vendor's agent agreed in writing "to hold the notes and deed of trust for ninety days, within which time title is to be made clear" by suit: *Held*, that such agreement did not make the sale conditional on the title being cleared within ninety days.—*Hefron v. Cunningham*, Tex., 13 S. W. Rep. 259.

209. VENDOR AND VENDEE—Title. — Where a vendor's legal title to land by adverse possession becomes perfect during the pendency of a suit for the purchase price, that fact may be set up by an amended pleading, and the vendee will be compelled to accept such title.— *Hall v. Scott's Admr.*, Ky., 13 S. W. Rep. 249.

210. VENDOR AND VENDEE.— A contract of sale of land which contains no description of the land sold is not rendered valid by having such description indorsed on the back of the contract, without any words connecting such indorsement with the contract itself.— *Wilstach v. Heyd*, Ind., 23 N. E. Rep. 963.

211. WATERS—Riparian Rights.—The right of a riparian proprietor upon navigable waters to improve, reclaim the submerged lands to the point of navigability, although originally incident to the riparian estate, may be separated therefrom and be transferred to persons having no interest in the original riparian estate. Overruling Land Co. v. Emerson, 38 Minn., 406.—*Hanford v. St. Paul, etc. R. Co.*, Minn., 44 N. W. Rep. 1144.

212. WILL—Nuncupative.—On proceedings to establish an alleged nuncupative will, made by deceased three days before his death, whereby he gave nearly all his property to his widow, to the exclusion of his children, it is proper to charge the jury that the nuncupative will must be strictly proved in all essential points; that it must be made as a matter of necessity, and not as a matter of choice; that it must appear that the deceased was *in extremis* when he made the will; and that the jury should find against the nuncupative will if they believed from the evidence that deceased had plenty of time and opportunity to execute a formal written will. — *Scaife v. Emmons*, Ga., 10 S. E. Rep. 1097.

213. WILL—Capacity.—In a contest by testator's heirs over his will, by which he devised his estate to a church, it being claimed by contestants that he was a religious monomaniac, an instruction to the jury to find the will valid if they find that testator was not at the time of its execution "dominated by some unnatural and irrational bias of mind, so as to overrule and control his own rational will-power," is erroneous, in that it is too broad, and leaves it for the jury to determine what constitutes such bias. — *Williams' Executor v. Williams*, Ky., 13 S. W. Rep. 250.

214. WILLS—Conflict of Laws.—Under How. St. Mich. § 5808, relating to wills executed in another State, and providing that after probate of such a will in Michigan the estate therein shall be disposed of according to its direction, the courts of Michigan are to be guided by the construction placed upon the will by the courts of the testator's domicile, where it has been so construed, unless it appear from the will that the testator had in mind the law of the *situs* of the property.—*Ford v. Ford*, Mich., 44 N. W. Rep. 1057.

215. WILLS—Contest. — In the contest of a will, under the issue of *devisavit vel non*, the court must hear the proof, and establish or reject the will, and contestant cannot take a voluntary nonsuit or dismissal. — *McMahon v. McMahon*, Mo., 13 S. W. Rep. 208.

216. WILLS—Lapsed Devise.—Where a woman, in contemplation of marriage, voluntarily deeds land to her intended husband, and he thereafter executes a will devising it to her in full of all claims which she may have against him at his decease, whether in consideration of the land or otherwise, on their subsequent marriage the title vests in him; and, if the wife dies first, the devise lapses.— *Pitman v. Burr*, Mich., 44 N. W, Rep. 951.